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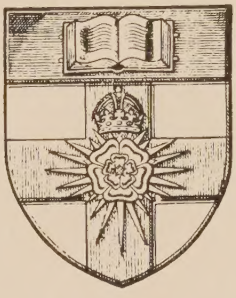

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JUDGES

OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE

L AND LI VICTORIÆ.

The Right Hon. Sir JAMES HANNEN, Knt., President.

The Hon. Sir CHARLES PARKER BUTT, Knt.

JUDGES

OF

THE COURT OF APPEAL.

L AND LI VICTORIÆ.

Lord HALSBURY, Lord Chancellor.

Lord COLERIDGE, Lord Chief Justice of England.

LORD ESHER, Master of the Rolls.

Sir JAMES HANNEN, President of the Probate, Divorce and Admiralty Division.

Sir HENRY COTTON,
Sir NATHANIEL LINDLEY,
Sir CHARLES S. C. BOWEN,
Sir EDWARD FRY,
Sir HENRY CHARLES LOPES,

} Ordinary Judges of Court of Appeal.

ERRATA.

Page	*Line*	*For*	*Read*
129	1 from bottom	"*E. P. Davis*"	"*Conrad J. Davis*"
160	note (8)	"1 P. D. 311"	"1 P. D. 411"
201	1 from bottom	"*Brooks*"	"*David Gunnell*"

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CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

L. VICTORIÆ.

THE ANDALINA.

1886
Aug. 10.

Wages—Charterer and Sub-Charterer—Towage—Light and Dock Dues—Priority of Claims.

Seamen have a maritime lien on freight due from sub-charterers to the charterers of a ship, and can arrest the cargo for the purpose of enforcing such lien.

The lien of seamen for wages ranks before a claim in respect of payments for the towage of the ship from sea to an inland port, and the light dues and dock dues.

MOTION for the payment out of court of the amount claimed for wages due to the mate and crew of the Norwegian brig *Andalina*. Judgment for their claim had been obtained in two actions by the crew and by the mate in the County Court of Hull, in which the *Andalina* had been arrested. Judgment had also been obtained in the same court by one Meek in a claim for necessaries. This claim contained items in respect of sums paid for the towage of the *Andalina* from sea to Hull and from Hull to Goole, and for light dues, and for wages paid to a seaman at the master's request. The *Andalina* had been sold by the marshal in an action in the High Court brought by Messrs.

1886

THE ANDALINA.

Burney & Dalzell for necessaries, and had realized 110*l.* 2*s.* 9*d.*, after paying the costs of the sale. The *Andalina* had been chartered by Messrs. Crauford & Rowatt on the 5th of June for a round voyage to Demerara and back. A sub-charter had been made on the 22nd of July between Messrs. Crauford & Rowatt and A. Bergmann in respect of the homeward voyage of the *Andalina*. The freight, 159*l.* 7*s.* 9*d.*, in respect of this homeward sub-charter had been paid into court; the amount due to the owners of the ship by Messrs. Crauford & Rowatt in respect of the round charter was 34*l.* 19*s.* 3*d.*

The county court actions had been transferred to the High Court.

Aspinall, for the mate and seamen. The mate and seamen have priority over all other claimants, and they are entitled to be paid their claim in full out of the proceeds of the sale of the ship and from the freight paid into court. Having a lien on the cargo for their wages, the fact that the freight paid into court has become due in respect of a sub-charter is immaterial.

Roscoe, for Meek. The claimant in this action has priority in respect of the payments for towage and light dues. The claim of salvors has been held to have priority over a claim by seamen, as it has been the means of enabling them to have the ship to proceed against: *The Gustaf* (1). A claim for towage of a sailing ship to a port of discharge inland may be supported on the same principle. By 17 & 18 Vict. c. 104, s. 401, the officials can distrain on and sell the vessel for sums due for light dues, and they must be paid before other claims are satisfied. Therefore Meek should rank before the seamen since he has paid them. He stands on the footing of the person who would have had a claim for towage and dues: *The William F. Safford.* (2)

Witt, for Messrs. Crauford & Rowatt. The balance of freight on the round charter, viz. 34*l.* 19*s.* 3*d.*, is all on which there can be a lien by the seamen; the freight under the sub-charter is due to the first charterers, and not to the shipowner. If this freight is taken in satisfaction of their claim, the seamen have a right against two freights.

Barnes, for Messrs. Burney & Dalzell.

(1) Lush. 506. (2) Lush. 69.

BUTT, J. The order I shall make is that the amount of the judgment in the action by the seamen is to be paid out of the freight payable by the sub-charterers, so far as it will suffice to satisfy it, and out of the balance from the sale of the ship if the freight is not enough. Then with regard to Meek's claim, I am of opinion that no part of it can rank before the claim of the seamen for wages. It has been argued that the towage of this vessel from the sea to Goole is on the same footing in this competition of claims as a salvage service, but I cannot agree with this proposition. With regard to the payment of the light and dock dues, I think that Meek's claim ranks after that of the seamen. With regard to Messrs. Crauford & Rowatt's claim, my opinion is that the seamen have a lien on the freight earned on the voyage, and that they have, therefore, a right to arrest the cargo when it reaches its destination, in order to enforce that lien. This right cannot be interfered with by any contract between the charterer and sub-charterer on the one hand, and the charterer and shipowner on the other. Therefore the seamen have the priority I have already stated; as to priorities between the other claimants I say nothing; it is sufficient for to-day to decide the question raised by the present motion on behalf of the mate and seamen.

Solicitors for mate and seamen, Meek, and Crauford & Rowatt: *Pritchard & Son.*

Solicitors for Burney & Dalzell: *Bateson & Co., Liverpool.*

E. S. R.

1886
Nov. 25, 28.

TENNANT AND OTHERS *v.* CROSS AND ANOTHER (THOROLD INTERVENING).

Probate Suit—Intervention—Two Sets of Costs allowed.

Where an intervener in a probate suit had been cited to appear by the defendants, the unsuccessful parties, and had been charged by them with procuring the will by undue influence, the Court, in pronouncing for the will, departed from the usual practice of allowing only one set of costs, and condemned the defendants in the costs of the intervener as well as of the executors.

THE plaintiffs, as executors, propounded the last will and testament of J. Cross, deceased, and the defendants, the two sole next of kin, pleaded in opposition, inter alia, that the will had been obtained by the undue influence of Mrs. Thorold, the residuary legatee and chief beneficiary under it. They also cited Mrs. Thorold to see proceedings. She entered an appearance, and pleaded a denial of the undue influence.

The suit was heard before Butt, J., and a special jury, but at the hearing, and before the jury were sworn, all opposition to the will was withdrawn. Evidence of due execution and the testamentary capacity of the testator having been given, the jury found all the issues for the plaintiffs. Butt, J., then pronounced for the will, and condemned the defendants in costs.

Lockwood, Q.C., for the intervener, asked for her costs. She has been made a party to the proceedings at the instance of the defendants, and was called on to defend herself against a charge of undue influence.

Inderwick, Q.C., for the defendants. It is the invariable practice of the Court to allow only one set of costs.

Cur. adv. vult.

BUTT, J. Although I find on inquiry that it is not in accordance with the general practice, yet, considering the exceptional circumstances of this case, I shall make an order that the intervener have her costs. Not only was she a party largely interested in the suit, but she was charged with having procured this will by undue influence, and no special circumstances were brought to my attention to shew that she might have been quite easy in

her mind in leaving her case in the hands of the executors. I therefore make an order condemning the defendants in the intervener's costs.

1886

TENNANT v. CROSS.

Solicitors for petitioners: *Horn & Francis.*
Solicitors for defendants: *Cole & Jackson.*

W. L.

THE MONARCH.

Oct. 30; *Nov.* 1.

Salvage—Compromise—Mistake of Fact—Salvage Services—Pilot.

A compromise of a salvage action agreed to by the salvors under a mistake of fact is not binding upon them.

Two tugs rendered salvage services to a ship driven from her moorings in the Bristol Channel, by towing her, in a very heavy gale, into the River Usk. The services lasted for about three hours. The value of the salved ship was 4000*l.*, of her cargo 900*l.*, and of her freight 288*l.* 450*l.* was awarded.

A pilot on the salved ship who rendered trifling assistance by helping at the wheel and windlass, *held*, not entitled to salvage.

ACTION OF SALVAGE.

The plaintiffs were the owners, masters, and crews of the steam-tugs *Empress of India* and *Wild Rose*, and John Williams, a pilot. They sued for salvage services rendered to the ship *Monarch*, her cargo and freight, on the 15th of October, 1886, in the Bristol Channel. The *Empress of India* was a paddle tug of 17 tons register, with disconnecting engines of 75 horse-power nominal and 400 horse-power effective, and was of the value of 5000*l.*, and at the time of her services, on the 15th of October, had five hands and the managing owner on board. The *Wild Rose* was a screw tug of 11 tons register, with engines of 75 horse-power nominal and 300 horse-power effective: at the time of the said services she had a crew of six hands, and her value was 3500*l.* The plaintiff Williams was a pilot engaged to pilot the *Monarch* to sea from Cardiff. The nature of the extra services rendered by him are stated in the judgment of the President.

The *Monarch* was a full-rigged ship of 1187 tons: the value of the ship was 4000*l.*, of the cargo 900*l.*, and of the net freight 288*l.*

As regards the services rendered by the two tugs, it appeared

1886

THE MONARCH.

that about 5 P.M., on the 15th of October, the *Monarch*, which was riding to her anchors in the Bristol Channel, near the Flatholmes Island, began to drag her anchors and drift in the direction of the island. She passed clear of it, and when about a mile to the eastward of it the two tugs, which had seen the position of the ship, were made fast. They towed the *Monarch* towards the entrance of the River Usk about 8 P.M. The hawser of the *Wild Rose* parted, and the *Monarch* was towed by the *Empress of India* alone into the river. About 8.30, as the latter tug was shortening her hawser, the *Monarch* drifted on to the soft mud in a safe position. She was then left by the tugs, and on the following evening, in fine weather, was towed off by them and taken to Newport by a third tug. The services on the 15th of October were rendered in a heavy gale with squalls and much sea.

The defendants, in addition to denying the value set on their services by the plaintiffs, also pleaded that the plaintiffs, by their agent, one of the owners of the *Empress of India*, agreed to accept, and were paid, 350*l.* in settlement of their claim. As to this point, it appeared that Messrs. Ingledew, Ince & Vachell, who were acting at Cardiff for all the parties, telegraphed to their London agents, Messrs. Ingledew, Ince & Colt, in consequence of certain correspondence, to accept 350*l.* as if paid into court. This was understood by the London agents as an acceptance in satisfaction of the action. Strong, who was the managing owner of the *Empress of India*, and who represented all the other plaintiffs, called on his solicitors' London agents to ascertain the day of trial, and at an interview between a representative of the defendants' solicitors and the agents of the plaintiffs' solicitors, reluctantly consented to this offer being accepted, supposing there was some reason for the telegram from Cardiff.

Finlay, Q.C., and *Pyke*, for the plaintiffs. A compromise effected by mistake is not binding: *Furnival* v. *Bogle* (1); *Yates* v. *Freckleton* (2); and so the plaintiffs are entitled to recover such a sum as the Court may think just.

Sir W. Phillimore, and *Barnes*, for the defendants. It is admitted that as against the owners of the *Wild Rose* Strong's

(1) 4 Russ. 142. (2) 2 Doug. 623.

assent to the compromise was not binding. As to the case of the *Empress of India*, the compromise was binding. They cited *Butler* v. *Knight* (1); *Griffith* v. *Williams* (2); *Swinfen* v. *Swinfen*. (3)

Counsel also addressed the Court on the value of the services rendered.

THE PRESIDENT. I am glad to have been relieved of the necessity of giving a decision as to the effect of a settlement on plaintiffs who have not consented to a compromise. I am still, however, called upon to give a decision as to the effect of the transaction between the defendants' solicitors and the agents of the plaintiffs' solicitors on the claim of the owners of the *Empress of India*. I am of opinion that the latter are not bound by the agreement in question, and that conclusion I arrive at on the following grounds. Strong was under the impression that his solicitors, who also represented other claimants, had agreed to take 350*l*. in full discharge of the entire claim. He, under that mistaken apprehension, consented to all the claims being settled on that basis. But no arrangement was made as to apportionment, and I do not see how I can now apportion the above sum so as to make it binding on Strong. The ground, therefore, on which I base my decision is, that there was a misapprehension on Strong's part as to the compromise by the other plaintiffs, and a compromise made under a mistake by one creditor as to something done by others, does not bind him. It is clear that Strong, though he acquiesced reluctantly, considered that 400*l*. would have been a reasonable sum in respect of the services rendered Accordingly, I cannot hold the compromise to be a binding one.

With regard to the main part of the case, the occurrences before the *Monarch* cleared the Flatholmes are of little importance, for she had gone some way towards the mouth of the Usk. The pilot has said he would have tried to beach her on the mud, and that if the sails had not held she would have been driven on to the hard sand and have become a total wreck. But I am advised by the Trinity Brethren that this would not have been the case, for she would have gone on to the mud. The tugs, it is true, saved the *Monarch* from a position of some danger, and for

(1) Law Rep. 2 Ex. 109. (2) 1 Term Rep. 710.
(3) 25 L. J. (C.P.) 303.

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this service they are entitled to a reasonable reward. The award I accordingly make is, to the *Empress of India* 235*l.* and to the *Wild Rose* 215*l.*; that is 100*l.* more than the amount tendered.

As regards the claim of the pilot, the question whether his services were changed, and whether he has done something beyond the ordinary work of a pilot, and so entitled himself to salvage, seems to be a question peculiarly for the Trinity Brethren. They think and I am of opinion that the services were not changed, and that this pilot is not entitled to claim salvage. What was in fact the nature of his so-called salvage services? He took a turn at the wheel and gave a hand at the windlass; this it was natural and proper he should do, but such trifling aid does not entitle him to claim salvage.

Solicitors for plaintiffs: *Ingledew, Ince & Colt.*
Solicitors for defendants: *T. Cooper & Co.*

E. S.

July 10, 12; *Oct.* 25; *Dec.* 7.

MARGARY AND LAYARD *v.* ROBINSON.

*Will—Execution—Mark—Foot or End—Intention—Revocation—*1 *Vict. c.* 26, *s.* 9—15 *Vict. c.* 24, *s.* 1.

A testator two days before his death, being paralysed on one side and partly speechless, intimated to the two medical men in attendance on him his desire to make a will. They interpreted his wishes by signs and wrote them down on a card. He executed the document by making his mark, which however appeared in the middle of the writing, and they then put their initials as witnesses at the back.

Subsequently, after a conversation with one of the testator's relatives, they returned to his room, and telling him that they had taken on themselves more responsibility than they ought to have taken, and that what they had written must be regarded as a memorandum, they erased their initials at the back. The testator seemed to acquiesce in this, but the card was found after his death in a handbag which he kept near his bed, and there was evidence that he had shewn it to the lady whom he intended it to benefit, telling her it was for her, and wished her to take it:—

Held, that the card constituted a valid testamentary paper duly witnessed, expressing the intentions of the deceased, and that what passed at the erasure of the witnesses' initials did not amount to a revocation; but that it was not signed at the "foot or end" within the meaning of the statute, and was therefore not duly executed and not entitled to probate.

THE plaintiffs, as executors, propounded a will and codicil of the Rev. J. T. Layard, deceased, late of Swayfield Rectory, in the county of Norfolk. The will was executed in 1884 and the

codicil in 1885, and they disposed of real estate as well as personal, and bequeathed more than fifty legacies, charitable and otherwise. Among them was one of 400*l.* to Miss Elizabeth Caroline Robinson, of Kapton Hall, in the county of Norfolk, to whom the deceased at the time of his death was engaged to be married.

Miss Robinson, in opposition, propounded a testamentary paper, purporting to be executed a few days before the deceased's death, in these words and in this form:—

"£30,000

"To Miss Robinson
to be tied up to
her for life and
after her to come
back to my family
and divided
fairly and equally."

Mr. Layard's Mark.

It was written on a card on the reverse side of which the attesting witnesses had put their initials thus:—

"Witnesses to Mark
P. E.
J. S.
Nov. 20, 1885."

The attesting witnesses were the medical men in attendance, Sir Peter Earle and Mr. Shepherd.

The testator being at the time paralysed and deprived of the use of one side and partly speechless, his wishes were interpreted by signs. One of the medical men wrote them out on a card, and the testator made his mark with a pencil, which appeared on the card partly across the word "life." The other circumstances attending the execution of the paper will be found set out in the judgment.

The defendant prayed administration with this paper annexed, and the plaintiffs, in reply, pleaded that the paper was not duly executed, and that in any event it was not signed in such a manner as to give effect to more than half of it.

The case was heard before the President without a jury.

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Bayford, Q.C. (*Middleton*, with him), for the plaintiffs. The evidence of the medical men shews that their intention was not to make a will but simply a memorandum of instructions from which a will might be made, and that was what the testator himself understood and intended to be the effect of what was done. The mark was only put there for purposes of identification.

[THE PRESIDENT. If what a man wishes to be done after his death is written down and duly executed that is a will, whatever his intention may be.]

The mark is not at the foot or end of the document as required by the statute, and on that ground the document is not entitled to probate: *Sweetland* v. *Sweetland* (1) and *In the Goods of Dilkes.* (2) If the mark were held to be a valid execution, it could not give effect to the words which come after it: *Keating* v. *Brooks* (3); *In the Goods of Davies* (4); *In the Goods of Standley.* (5) But if those words were excluded the testator's intentions would not be carried out, as the 30,000*l.* which he intended to be fairly shared among his family after Miss Robinson's decease would under the will go to the residuary legatee.

Lockwood, Q.C. (*Searle* with him), for the defendant. The Court has allowed probate of a will under similar circumstances where there has been writing after the signature which the context shewed to be part of the will, and which was proved in evidence to have been there at the time of execution: *In the Goods of Kimpton* (6); *In the Goods of Woodley* (7); *In the Goods of Archer* (8); *In the Goods of Ainsworth* (9); *In the Goods of Coombs* (10); *In the Goods of Wright.* (11) Under the circumstances and in the condition in which the testator was when he made his mark, and from the card being filled up, as well as from the direction in which the mark was made, and the words "Mr. Layard's mark" were written, it may be presumed to have been made at the end. But the Court may grant probate of the part which precedes the mark.

Cur adv. vult.

(1) 4 Sw. & Tr. 6.
(2) Law Rep. 3 P. & M. 164.
(3) 4 N. of C. 261.
(4) 3 Curt. 748.
(5) 7 N. of C. 69.
(6) 3 Sw. & Tr. 427.
(7) 3 Sw. & Tr. 429.
(8) Law Rep. 2 P. & M. 252.
(9) Law Rep. 2 P. & M. 151.
(10) Law Rep. 1 P. & M. 202.
(11) 34 L. J. (P. & M.) 104.

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THE PRESIDENT. In this case the deceased, the Rev. J. T. Layard, of Swayfield, Norfolk, a widower, sixty-three years of age, became engaged to Miss Robinson. On the 13th of November, 1885, shortly before the time fixed for his marriage, he was seized with paralysis, from which he partially recovered, but he was unable to write, and his power of speech continued affected though not altogether destroyed, until his death, which occurred on the 24th. He could, however, make himself understood by those about him by means of signs, and he succeeded in conveying to his medical attendants, Mr. Shepherd and Sir Peter Earle, that he desired to make a testamentary disposition in favour of Miss Robinson. It is unnecessary to state the manner in which he communicated his wishes to these gentlemen, because it is admitted that they did in fact correctly interpret the meaning of his signs, which they reduced to writing on a small card, $3\frac{1}{4}$ by $4\frac{1}{4}$ inches in size in the following words:

"£30,000
"To Miss Robinson
to be tied up to
her ~~for~~ life and
after her to come
back to my family
and divided
fairly and equally."

The deceased then with a pencil made a cross upon the word "for." But as this mark was faint he made a second cross through and under the word "life." Sir Peter Earle then wrote diagonally from the second cross towards the right hand upper corner of the card the words: "Mr. Layard's mark." Sir Peter then wrote on the upper part of the other side of the card: "witnesses to mark," and beneath these words Sir Peter placed his initials: "P. E.," and Mr. Shepherd placed his: "J. S.," with the date: "November 20, 1885." The deceased and the witnesses were together during the whole transaction. The card was then put in a bag which remained in the deceased's room.

The witnesses then left, and had an interview with the deceased's half-brother, the Rev. Clement Layard, the result of which was

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that they returned to the deceased's room, and Sir Peter said to him that "what they had done was dealing with a very large sum of money, and that they had taken more responsibility upon themselves than they ought to have done, and therefore they wished to erase the names that were put on the back of the card, as it might lead to litigation." They also told the deceased they did not consider it a will, but only a memorandum. They then erased the writing on the back of the card. To all this they say the deceased gave signs of assent. They then left the room, deceased retaining the card. The next day the deceased had an interview with Miss Robinson, when he made signs that he wished for the bag in which the card was, and having taken the card out he gave it to Miss Robinson, saying, "read it, read it—it is for you."

I have already stated that it is admitted, and I entertain no doubt, that Sir Peter Earle correctly interpreted and expressed the wishes of the deceased by the words written on the card. I also find that the deceased authorized the writing of these words, that he intended them to take effect upon his death, and further, that the deceased intended by his mark to give legal effect to that which was written. The witnesses duly attested this writing in the presence of the deceased. Subject to the question whether the mark is in a proper position, I am of opinion that the writing on the card constitutes a valid testamentary paper, and that it was duly witnessed by the attesting witnesses. Whether they thought it to be a valid will or a memorandum, is immaterial. The function of witnesses to a will is simply to authenticate the testator's signature, and this being done, their opinions, or beliefs, or intentions, are irrelevant.

I am further of opinion that the subsequent erasing of the attestation by the witnesses is immaterial. The evidence does not satisfy me that the testator ever intended to revoke the testamentary disposition he had made. A duly executed and attested will can only be revoked in one of the ways pointed out by the Wills Act, 1 Vict. c. 26, that is by another will or codicil, or "by the burning, tearing, or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same."

Without entering upon the question whether the mere erasing

of the witnesses names' would be a sufficient "destruction" within the meaning of the statute, the evidence falls far short of establishing that the deceased directed the destruction of this document with the intention of revoking it.

The remaining question to be considered is whether the position of the deceased's mark is consistent with a valid execution of the instrument.

The Wills Act requires that the will shall be signed *at the foot or end* thereof by the testator. This remains the governing provision notwithstanding the elaborate gloss upon the words "foot or end" contained in Lord St. Leonards' Act, 15 Vict. c. 24. That statute enacts that "Every will shall so far only as regards the position of the signature of the testator . . . . be deemed to be valid within the said enactment, as explained by this Act, if the signature shall be so placed, at or after, or following, or under or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will."

In this case the mark of the deceased is in the very middle of the writing, and not at the foot or end thereof, or in any place the connection of which with the end can be expressed by any of the prepositions enumerated in the Wills Act.

It was contended that the mark might be regarded as having been made across the page because there was no room for it at the foot or end; and the direction in which the words "Mr. Layard's mark," are written, was relied on as supporting this contention. There is in fact abundant space for a mark at the end of the writing, but if this were otherwise, I should not be justified in putting a forced construction on the words of the statute and holding that where there is not space for the signature at the foot or end it may be placed at the beginning or middle.

It was further contended that effect might be given to all that is above the mark, and that what is below might be rejected. On this point I cannot do better than repeat the language of Lord Penzance in *Sweetland* v. *Sweetland*. (1) "The Court would not be justified in fixing upon a signature in the midst of what

(1) 4 S. & Tr. 6.

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the testator intended as his will and treating it as an execution of all that preceded and granting probate of so much of the will to the disregard of the remainder. This in many cases might produce a testamentary result far from the testator's wishes. It does not become the Court in a laudable anxiety to give effect to the document to twist or distort the plain meaning of the statute by ingenious construction, and virtually break the law to mend the testator's blunder."

I must therefore pronounce against the probate of the document propounded by the defendant and in favour of the will and codicil propounded by the plaintiffs, but I allow the costs of both parties out of the estate.

Solicitors for plaintiffs: *Saxton & Sons.*

Solicitor for defendant: *Martelli.*

W. L.

Oct. 25.

GARDINER *v.* COURTHOPE.

Probate—Draft Wills—Codicil only duly executed Paper forthcoming—Revocation—Wills Act (1 *Vict. c.* 26), *s.* 20.

At the death of a testatrix the sole testamentary papers forthcoming were a duly executed codicil and two drafts of wills, as to the execution or revocation of which there was no evidence:—

Held, that though the codicil by its language was dependent on the will to which it belonged, and could not be construed without it, it ought to be admitted to probate, not having been revoked in any of the methods prescribed by the Wills Act.

Black v. *Jobling* (Law Rep. 1 P. & M. 685) followed.

CAROLINE MARY GARDINER, spinster, late of Great Malvern, in the county of Worcester, died on the 2nd of March, 1885.

After her death the sole testamentary documents found among her papers were a duly executed codicil bearing date the 22nd of May, 1862, and drafts of two wills, one dated 1847 and the other 1855. The codicil was in the following terms:—

"In consequence of the decease of my sister, Sophia Du Pré, I deem it advisable to make the following alteration in the distribution of my estate. It is my desire that my executor or executors, his or their heirs, administrators or assigns, immediately after my decease stand possessed of that portion of my

estate which would have devolved on my said sister, Sophia, to the use of the children of the said Sophia Du Pré, and my deceased brother Robert Barlow Gardiner, to be paid to them in equal shares and proportions (with benefit of survivorship) upon their attaining the age of twenty-one years, or day of marriage, which shall first happen, and in the meantime to be employed in their maintenance and education, according to the discretion of my said executor or executors, and I further direct that upon the decease of my sister, Fanny Courthope, the share of my estate, which by my death will devolve upon her for life, shall also in like manner be divided among my said nephews and nieces."

The plaintiff, a nephew of deceased, as one of the residuary legatees and next of kin, propounded the draft of the will of 1847 and the codicil of 1862 as together constituting the last will of deceased, and the defendants, others of the next of kin, pleaded in opposition, non-execution, that the deceased did not know and approve of the contents; that the will of 1847 had been revoked by the will of 1855, which had also been revoked by destruction; and that the codicil of the deceased, being intended to operate in conjunction with and to be dependent on the deceased's last will and testament, had been revoked by the destruction, with intention to revoke, of the said last will.

The case was heard before Butt, J., without a jury. The due execution of the codicil was proved, but there was no evidence as to the execution or revocation of the wills of 1847 and 1855. It appeared, however, that in these years correspondence had passed between the deceased and her brother-in-law, Mr. William Courthope, since deceased—who at that time managed her affairs, as to the disposition of her property—and that Mr. Courthope on both occasions sent her drafts framed in accordance with her instructions. The codicil of 1862, which became necessary in consequence of the death of a sister, was also drawn by Mr. Courthope; and though it was difficult to make sense of the codicil apart from the will, as it was made in execution of a power, it was desirable to obtain probate of it in order to raise the question whether the power had been exercised.

Inderwick, Q.C. (*Farwell*, with him), for the plaintiff. Whatever may be decided as to the will, the codicil is clearly entitled to

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probate. It has not been revoked by any of the methods prescribed by the Wills Act. He cited *Black* v. *Jobling* (1), and *In the Goods of Turner.* (2)

F. J. Lewis, for the defendants. The codicil falls with the will. *Sugden* v. *Lord St. Leonards,* (3) does not follow *Black* v. *Jobling,* (1), for there a plea was held to be good which alleged that a codicil had no force and validity apart from the will, and was revoked when the will was revoked. In *In the Goods of Bleckley* (4), where a codicil was written on the same sheet of paper as the will, it was held to be revoked by the cutting out of the signature to the will, although it was not mutilated in any other way. The language of the codicil shews that it was meant to be construed with the will, and it must be presumed therefore that when the testatrix destroyed the will she also intended the codicil to be revoked.

BUTT, J. I must admit this codicil to probate. The codicil itself was certainly not destroyed actually or physically in any of the ways mentioned in the 20th section of the Wills Act, and I must say that, looking to that section of the Act, it does appear to me that it would be difficult to decide the case in a sense contrary to the authorities which have been cited, namely, *Black* v. *Jobling* (1), and *In the Goods of Turner.* (2) The learned judge in the first case put exactly the same construction on the Act of Parliament which I should have put on it if I had been left to myself. I understand his decision to be that where a testamentary document is produced, and is proved to have been duly executed, as such, it must be admitted to proof unless it has been revoked in one or other of the ways referred to in the statute. But it is said that there are authorities which conflict with that decision. It is said that the President in the case of *In the Goods of Bleckley* (4) decided that the law as stated by Lord Penzance in his judgment was not correct. On looking to that case, I have my doubts whether the President ruled anything of the kind attributed to him. His decision seems to me to be a finding of fact that the deceased in that case had destroyed the document with the intention of destroying the codicil as well as the will.

(1) Law Rep. 1 P. & M. 685.
(2) Law Rep. 2 P. & M. 403.
(3) 1 P. D. 154.
(4) 8 P. D. 169.

There is no direct evidence of any such intention on the part of testatrix with regard to the codicil with which I am now dealing. Mr. Lewis, I know, says that such evidence is to be found within the four corners of the codicil itself, and that the codicil is so far dependent upon the will, that if you assume an intention to destroy the will, you must assume that the same act was intended to destroy the codicil also. I cannot go the length of that reasoning. It is perfectly true that the presumption of law, when a testamentary document in the possession of a deceased is not forthcoming at his death, is that it was destroyed with the intention of revoking it. But to go further and to hold that the will was destroyed with the intention to revoke, because it is not found among the deceased's papers, and then to say that the codicil which is preserved among the deceased's papers was therefore a document which the deceased intended to destroy also, is, I think, going beyond the bounds authorized by the law. I therefore cannot find that it was the intention of the deceased to destroy the codicil, and that being so, the case is not within the decision of Sir James Hannen in *In the Goods of Bleckley*. (1) But then it is said that there is another decision, in the case of *Sugden* v. *Lord St. Leonards* (2), which conflicts with *Black* v. *Jobling*. (3) It is perfectly true that in dealing with a demurrer to a plea which he had already found to be not true in fact, and as to which therefore it did not matter one straw for the purposes of the case whether it was good or bad in law, the learned judge did intimate that he thought that plea a good plea, although that view seems inconsistent with the decision of Lord Penzance in the cases which have been cited. I am not prepared to hold that Lord Penzance was wrong in *Black* v. *Jobling* (3), and in *In the Goods of Turner*. (4) I consider myself bound by those decisions. It is clearly proved that the codicil was duly executed, and there being no proof that it was revoked, I admit it to probate, but I refuse to make any order as to the other two papers.

Solicitors for plaintiff: *Hill, Son, & Rickards.*

Solicitor for defendants: *John M. Mitchell.*

(1) 8 P. D. 169.
(2) 1 P. D. 154.
(3) Law Rep. 1 P. & M. 685.
(4) Law Rep. 2 P. & M. 403.

W. L.

1886
Dec. 7.

In the Goods of JANE TURNER.

Administration—Wife's Estate—Bankruptcy of Husband—Right of Trustee in Bankruptcy to administer—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 44—*Grant—Court of Probate Act* (20 & 21 *Vict. c.* 77), *s.* 73.

A husband's right to administer to his wife's estate is not such a right as will vest in the trustee under his bankruptcy.

Where the husband of a deceased intestate had left this country and had been adjudicated bankrupt before he had administered to his wife's estate, the Court refused to regard his right to administer as property divisible among his creditors under the 44th section of the Bankruptcy Act, but made a grant of administration to the wife's estate to the trustee, under the 73rd section of the Court of Probate Act.

Jane Turner, late of Over Darwen, in the county of Lancaster, wife of Shepherd Turner, died the 31st of March, 1886, intestate, leaving her husband her surviving.

Shepherd Turner was adjudicated a bankrupt on the 4th of October, 1886, and Henry Whalley, the applicant, was duly appointed trustee of his estate.

The sole estate of Jane Turner, the deceased, consisted of a sum of 20*l.* due from the Prudential Life Assurance Company.

Shepherd Turner in 1883 left this country for the United States, being now resident at New Brighton, in the State of Pennsylvania, and he had not been cited in reference to this application, nor had he taken any step to obtain administration.

R. H. Pritchard, moved on behalf of Mr. Whalley, the trustee in bankruptcy, for a grant of administration to the estate of Mrs. Turner. The husband is entitled by law to the administration of his wife's estate, and that is a property within the meaning of the 44th section of the Bankruptcy Act of 1883, which would vest in the trustee in bankruptcy and be divisible among the creditors. (1)

(1) The material words of s. 44 (description of bankrupt's property divisible among creditors) relied on are as follows: "The capacity to exercise or to take proceedings for exercising any such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge."

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BUTT, J. I am of opinion that the right of the husband to administer to his wife's estate is not a right which passes to the husband's trustee in bankruptcy. The section of the Bankruptcy Act of 1883 to which I have been referred seems to me to be limited to rights which a bankrupt may exercise for his own benefit, and for his own benefit alone. This is not such a right, and is therefore not vested in the trustee in bankruptcy. The applicant is not entitled to the grant on the grounds he puts forward; but, under the circumstances, I think a grant may go to him under the 73rd section of the Court of Probate Act, and as the estate is so small I shall not require the husband to be cited.

Solicitors: *E. Doyle & Sons, for Walmsley & Kay, Darwen.*

W. L.

BROOK *v.* BROOK.

Nov. 3.

Divorce—Cruelty—General Charge—Particulars—Pleading.

Evidence of an act of actual violence is not admissible where only a general allegation of cruelty has been made in a petition.

Where evidence was offered that the husband had struck his wife a blow, and no such specific charge had been made in the petition, the Court allowed the hearing to be adjourned in order that particulars might be furnished.

THIS was a petition presented by the wife in which she prayed for a dissolution of her marriage on the ground of her husband's adultery coupled with cruelty and desertion.

The paragraphs in her petition relating to the cruelty were in the following terms:—

3. That the said James Swift Brook was during all the cohabitation frequently drunk and treated her with cruelty.

4. That he wilfully disturbed her when lying in child-bed and threatened her with violence and injured her health.

5. That he wilfully neglected to provide her and her children with sufficient food and clothing.

6. That he drew a carving knife across her throat and caused her great fear.

The case was heard before Butt, J., without a jury.

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Middleton, for the petitioner.
Searle, for the respondent.

The petitioner was examined, and after giving some general evidence as to unkind and harsh treatment, she was asked whether her husband on a certain occasion had struck her in the face.

Searle objected. There is no such charge in the petition, but simply a general allegation that the respondent treated her with cruelty.

Middleton submitted that the evidence was covered by the general plea of cruelty and was an amplification of it. If the respondent objected to the plea he should have asked for particulars.

BUTT, J. I do not think a man ought to be charged with striking his wife without having due notice of it in the petition. There is nothing about a blow in the petition, and as it stands I shall not allow the evidence to be given. I shall allow the petition to be amended, but if the respondent desires it there must be an adjournment to enable him to meet the charge. The best course will be to order particulars to be given and to adjourn the further hearing for that purpose.

Evidence was given of the adultery and the hearing was then adjourned for a week.

Solicitors for petitioner: *Few & Co.*
Solicitors for respondents: *Wynne-Baxter, Rance, & Meade.*

W. L.

SCOTT, FALSELY CALLED SEBRIGHT *v.* SEBRIGHT. 1886 Nov. 12, 13, 16.

Nullity of Marriage—Duress—Mental Prostration—Incapacity to resist Coercion—Decree.

The petitioner, a young woman of twenty-two years of age, entitled to a sum of 26,000*l.* in actual possession and a considerable sum in reversion, had become engaged to the respondent, and shortly after coming of age was induced by him to accept bills to the amount of 3325*l.* The persons who had discounted these bills subsequently issued writs against her, and threatened to make her a bankrupt. The distress caused by these threats seriously affected her health, and reduced her to a state of bodily and mental prostration, in which she was incapable of resisting coercion and threats, and being assured by the respondent that the only method of evading bankruptcy proceedings and exposure was to marry him, she reluctantly went through a ceremony of marriage with him at a registrar's office. In addition to other threats of ruining her, the respondent immediately before the ceremony threatened to shoot her, if she shewed that she was not acting of her free will. The marriage was never consummated, and the petitioner and the respondent separated immediately after the ceremony:—

Held, that there was not such a consent on the part of the petitioner as the law requires for the making of a contract of marriage, and that the ceremony before the registrar must be declared null and void.

THIS was a petition presented by Lena Mary Scott, otherwise called Lena Mary Sebright, praying for a decree declaring a pretended ceremony of marriage celebrated on the 30th day of January, 1886, between her and the respondent Arthur Edward Sanders Sebright at the registry office, South Audley Street, in the county of Middlesex, to be null and void.

In her petition she alleged that the marriage had never been consummated, and that she and the respondent had never cohabited, and the third and following paragraphs were as follows:—

"That your petitioner was induced to be a party to the said pretended ceremony of marriage, not of her own free will, but through fear and terror of the said respondent.

"That your petitioner was also induced to be a party to the said pretended ceremony of marriage, by reason of false representations, fraudulently made to her by the respondent and others acting in concert with him, to the effect that unless your petitioner married the respondent she would be made a bankrupt, which said representations your petitioner believed to be true."

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The following were the particulars of these pleas :—

"That the respondent frequently threatened the petitioner that unless she would marry him he would accuse her to her mother and in every drawing-room in London of having been seduced by him.

"That the respondent frequently told the petitioner that unless she would marry him, he would tell her mother (Lady Scott) of her having given him acceptances to a very large amount, and upon which proceedings were being taken against her, but that if she would marry him he would provide for the bills in due course, and that neither her mother nor any one else would know of the charge of unchastity or of the acceptances.

"That the petitioner stood in fear and terror of the respondent, by reason of his being a man of strong will and masterful disposition, whereby he acquired complete dominion over her."

The following are the further and better particulars of the false representations, and of the times when they were made.

"That the respondent frequently in the month of January, 1886, told the petitioner that unless she married him she would be made bankrupt and ruined, and that the only way of saving herself from the bankruptcy and ruin financially was by marrying him."

The respondent traversed the third and fourth paragraphs of the petition, and prayed for a restitution of conjugal rights.

The case was heard before Butt, J., without a jury, and the facts will be found set out with sufficient fullness in the judgment.

Sir R. Webster, A.G. (*Dr. Tristram, Q.C., Pollard,* and *Statham,* with him), in summing up the evidence for the petitioner, submitted that a marriage contract, apart from the religious ceremony, must be dealt with on the same principles as other contracts, and could be set aside on the same grounds. There must be a consent by both parties of a sufficient age, and a consent with all its incidents. There must be a consent, among other incidents, to future cohabitation, but if it were found that there was no intention in one of the parties ever to cohabit, that would have a material bearing on the nature of the consent

given. The consent must be given without fraud or duress, and the duress need not be confined to fear of bodily harm. Terror of the mind will be sufficient to make the contract void, or misrepresentation that marriage is the only way of avoiding some great danger.

He cited Bishop on Marriage and Divorce, ss. 195, 210, 211, 5th ed.; *Harford* v. *Morris* (1); *Portsmouth* v. *Portsmouth* (2); *Wilkinson* v. *Wilkinson* (3); *Turner's Case* (4); *Field's Marriage Bill* (5); *Hull* v. *Hull* (6); *Harrod* v. *Harrod* (7); *Hancock* v. *Peaty*. (8)

Sir E. Clarke, S.G. (*Inderwick, Q.C.*, and *Searle*, with him), for the respondent, offered no opposition to the decree.

Cur. adv. vult.

BUTT, J. The petitioner seeks a declaration of the nullity of her marriage alleged to have been duly solemnized at the registry office in South Audley Street, on the 30th of January, 1886, on the ground of fraud and duress. The petition also alleges that the marriage was never consummated. The respondent in his answer denies the charges made in the petition, and by way of counter-claim asks for a decree for the enforcement of his conjugal rights. The claim of the petitioner to the relief prayed is based on the allegation that owing to the circumstances in which she was placed by the conduct and acts of the respondent—by the deceit practised upon her, and by the fear with which she was inspired—the petitioner was not a free agent when she went through the ceremony in question, and that there was consequently no valid consent on her part to the contract of marriage. The Courts of law have always refused to recognize as binding contracts to which the consent of either party has been obtained by fraud or duress, and the validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract. True it is that in contracts of marriage there is an interest involved above and beyond that of the

(1) 2 Hagg. Cons. 423.
(2) 1 Hagg. Ecc. 355.
(3) 4 N. of C. 295.
(4) Macq. H. L. Pr. 426.
(5) 2 H. L. C. 48.
(6) 17 L. T. (O.S.) 235.
(7) 1 Kay & Johns. 4.
(8) Law Rep. 1 P. & M. 335.

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immediate parties. Public policy requires that marriages should not be lightly set aside, and there is in some cases the strongest temptation to the parties more immediately interested to act in collusion in obtaining a dissolution of the marriage tie. These reasons necessitate great care and circumspection on the part of the tribunal, but they in no wise alter the principle or the grounds on which this, like any other contract, may be avoided. It has sometimes been said that in order to avoid a contract entered into through fear, the fear must be such as would impel a person of ordinary courage and resolution to yield to it. I do not think that is an accurate statement of the law. Whenever from natural weakness of intellect or from fear—whether reasonably entertained or not—either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger. The difficulty consists not in any uncertainty of the law on the subject, but in its application to the facts of each individual case. The question here is whether the facts disclosed in evidence bring this case within the rule. The petitioner is a young lady who attained the age of twenty-one in February, 1885. It is not suggested that she is what is called a person of weak mind, but it is alleged that circumstances to which I am about to advert had, in the latter end of 1885 and the beginning of 1886, so affected her health as to produce a mental condition wholly abnormal. Five or six years ago she made the acquaintance of the respondent, a man some few years older than herself. Soon after their acquaintance began he made her a proposal of marriage which was refused. Subsequently they became engaged, and although there were periods during which there was an interruption of the relations which her acceptance of his offer had created, the engagement was never absolutely broken off. The young lady on coming of age was entitled to a sum of 26,000*l.*, and she had a reversionary interest in a considerable sum beyond that amount. Acting on her mother's advice, in the month of June, 1885, she made a settlement of her property on trustees for her own benefit. In March of that year, a month after she came of age, the respondent, who was in pecuniary diffi-

culties, induced her to put her name to a bill of exchange for 500*l.* for his accommodation. It is needless to say that this was concealed from her mother and her friends. Other transactions of a similar nature followed in the summer and autumn of the same year, until in the month of December she had incurred liabilities on the respondent's behalf and entirely for his accommodation to the amount of 3325*l.* The bills of exchange appear to have been discounted for the respondent by two persons of the names of Williams and Lee. As is commonly the case with men in the respondent's circumstances, he was profuse in his assurances that these transactions were little more than matters of form, and that the petitioner would never hear more of the matter. As is also common in such cases, he never provided one sixpence to meet his liability on the bills, and in the result the petitioner was pressed for payment by Lee and Williams, by one or both of whom writs were issued against her and bankruptcy proceedings threatened. It is not matter of surprise that a young and inexperienced girl so situate should undergo mental suffering sufficiently acute to impair her bodily health. To such a person writs and bankruptcy summonses may well appear endued with unknown terrors. In the present instance it is alleged that the worry and distress to which the petitioner was subjected resulted in such a degree of prostration, bodily and mental, as to render her, if not incapable of exercising her reason, at all events unable to resist constraint and pressure brought to bear on her by others for their own ends. There is certainly abundant testimony to the condition to which the petitioner had gradually been brought by the end of the year 1885. Nurses, friends, doctors concur in describing the marked alteration that had taken place, and Mr. Izod, the medical adviser of the family, appears to have entertained the most serious apprehensions, for he told her mother that unless the petitioner's condition improved melancholia would ensue. Probably the most conclusive evidence of this young lady's condition is furnished by three letters which she wrote to a friend—Mr. Guedalla, a solicitor—in the middle of January last. They are too long and incoherent to read in extenso, but the following extracts are a fair sample of their contents:—"My dear Mr. Guedalla,—I am writing you in

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the greatest distress, and I know I can depend on your honour as a gentleman never to mention a word of what I say in this letter. I know I can depend on you to do this, and for God's sake save me from the ruin that stares me in the face. I have been got into a terrible mess, and for God's sake save me. For the friendship, dear Mr. Guedalla, you have always had for us, do listen to me. Will you lend 2000*l.*? I am nearly mad. I will tell you everything when I come back to London; only for God's sake save me from disgrace. You are the only person I can trust; for Heaven's sake do this for me, and charge me any per cent. you like, but pray save me. In a few days I shall be ruined, as I do not like going to anybody else for help. You are the only man I can trust. For Heaven's sake, Mr. Guedalla, do this. I shall be thankful to you all the rest of my life. . . . . I have not slept for nearly a fortnight. I am nearly wild. Pray, pray, be kind, and lend it to me for a year, and charge me any per cent., but for Heaven's sake lend it to me. . . . . Three months or a little more ago I signed two bills for Mr. Sebright (I rely on you never to tell him I have told you) till I see you in about a week. When I signed them I did so because he asked me so, and I was stupid enough to do it, and he promised me most faithfully to meet them when they came due. To my horror, he did not, and one is a good deal overdue for 1000*l.* to a 'Mr. Williams,' in George Yard, Lombard Street, but he is very nice about it, and as a favour to me says he will wait till the 30th. They served me with a writ and everything, and I was nearly mad. Then the other became due last Wednesday, and the man, Mr. Lee, has written me such a rude letter—I do not wonder at it—and the next thing will be he will serve me with a writ too. I am nearly distracted. I own I ought never to have done it, but pray help me, for the love of Heaven. I would not have mother know for anything, and it is hard, as I am fond of Mr. Sebright. Only help me, and I will thank you all the rest of my life. For Heaven's sake, don't let him serve me with a writ, for it is bound to be known and then I shall be ruined. I want the 2000*l.* to pay them both right off, as Mr. Lee's is really 1000*l.* and Williams' is 2000*l.*, and I shall go mad if I have a week's more of this awful worry. You will see that I am in the direst need. I

implore you, you have a kind heart, to save me, dear Mr. Guedalla—for Heaven's sake save me, you will see how I am pushed. . . . The bill was presented last Wednesday. He will serve me with a writ. Oh, what am I to do? God knows. Pray help me and lend it to me. I pray of you to help me and lend me the money. I am nearly mad with anxiety and worry. For God's sake be kind and help me. . . . I am so grieved that he should think it's me who has done this dirty trick. I would not do a dirty action intentionally for anything; for God's sake, Mr. Guedalla, if you have any friendship for me, save me, now you see the position I am placed in. For God's sake send to Lee, and ask him not to send a writ to me, ask him to send it to you for me. Oh God! I am nearly mad with agony. . . . God knows what I am to do; you will see no wonder I am ill and wretched, and nearly mad from despair. Can't you think of any one who would lend it to me, if Mr. Rose won't, to save me?—for if I can't get it you know I must marry him; he says he can't and won't even try and get the money unless I do so. You will be able now to understand my feelings. I am nearly driven wild; don't you be cross to me as well. I have nobody to confide my troubles in but you, as I never want any one else to know how disgracefully he has behaved to me. Pray do not take offence at anything I say, I do not mean it, but make a little excuse for me in this terrible position I am placed in. It's simply eating my heart out; you will now see how nearly desperate I am driven." I have read but a small portion of these letters. The parts omitted are but a repetition, again and again reiterated, of the expressions of agony and the appeals for help. It should not, however, be forgotten that the very iteration of these piteous appeals is in itself an indication of the mental condition of the writer. No one, I think, could hear those letters read without asking himself whether there was not something weighing on the mind of the writer beyond the mere pecuniary difficulty. On turning to the particulars delivered in this action, I find the following allegation:—"That the respondent frequently threatened the petitioner that unless she would marry him he would accuse her to her mother, and in every drawing-room in London, of having been seduced by him." On this part of the case, by an arrangement, as I understand, between counsel, no evidence had

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been offered. I do not complain of the course taken, but it appeared to me that to decide the question of the validity of this marriage in ignorance of the real state of the case on this point would be to proceed in the dark, and I felt it my duty to call for some explanation. The respondent thereupon went into the witness-box, and stated, on his oath, that no impropriety between himself and Miss Scott had ever occurred. That is the only evidence he has given in this case. Assuming it to be true, he is entitled to the credit of having exhibited one solitary spark of good feeling in the course of a long series of misdeeds perpetrated upon a defenceless girl—misconduct for which it would not be easy to find language of adequate reprobation. The matter is set at rest by other evidence. At the end of March, when Lady Scott first knew of the marriage, she insisted on an examination of the petitioner by Mr. Izod, who found her to be virgo intacta. Eliminate this matter from the case, and the contents of the letters, parts of which I have read, become all the more inexplicable on any theory other than that they were the the production of a mind enfeebled by disease. Whether the cause assigned for this condition of the petitioner is adequate or not is immaterial. The fact exists. The mental and bodily prostration is clearly established, and it is all important when we come to consider the events which followed. It appears that the holder of one of the bills, amounting to 1000*l.*, had agreed to give the petitioner until the 30th of January to pay it, intimating that he would wait no longer, but would make her a bankrupt if she did not pay then. The respondent had told her that the only way out of her difficulty was to marry him, that the marriage would enable him to make arrangements with Lee and Williams which would free her from further molestation, but that if she refused to marry him he would not even try to make such an arrangement. He added that if she did so refuse he would ruin her. On one of the last days of January, and therefore very shortly before the day the marriage ceremony was performed, the respondent sent the petitioner to the office of one Arthur Burr, who is described as an insurance agent. Burr told her that he would "settle the bills" if she would marry Sebright, but unless she did so he would not help her. On the 29th of January the petitioner at the respondent's request visited him at

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his office in Great George Street on the subject of the bills. In the course of that interview Williams came in and told the petitioner that unless the bills were paid he would make her a bankrupt next week. That same evening the respondent wrote to the petitioner asking her to meet him next day at the corner of Mount Street about the bills. She went, accompanied as far as Bond Street by Mrs. Butler, who had been engaged to nurse her mother in her illness. The following is the petitioner's evidence as to what occurred on that occasion:—"I met him at the corner of Mount Street next morning. Emma Butler was with me. I left her in a shop in Bond Street and met respondent there. I went in a cab. Respondent stopped the cab and got in. He asked me to shake hands with him, and I would not. He had told the cabman where to go when he got in. The cab stopped in South Audley Street, at the registry office. He took me upstairs by the arm. He grasped my arm. I was nearly mad. I had no notion I was going into a marriage office. Count Valhermay was there. I had seen him before. I did not like him. Respondent said to me he had brought me there to marry me that morning. I said I wished to go out of the room. Count Valhermay stood at the door, and said I should not leave. Respondent said if I did anything to shew that I was not acting of my own free will he would shoot me. He had pointed a pistol at me before, in May, 1885. Some people then came into the room. They spoke to me, but I don't know what they said. I was standing with my back to respondent. The ring was put on my finger by respondent, and I threw it away. It never was over my knuckle. They asked me to take off my glove. I refused. They ordered me to, and I did. I was going out of the room. Respondent called me back, and said I was to sign my name. He said if I did not come back and behave properly he would ruin me. I think he took hold of my arm and brought me back. I would not speak to Count Valhermay. I was afraid of respondent; he used to threaten me dreadfully. It was certainly not my wish to go through the ceremony of marriage with respondent. I would not have done so but for what he said. I signed the book. He was knocking my arm the whole time to make me sign. I went downstairs. Respondent accompanied me. At the bottom of the

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stairs he told me to go, he had got all he wanted out of me. I got into a cab and went back to the nurse. I don't know what state I was in. I have only seen the respondent twice since. I have never lived with him. The marriage has never been consummated." The superintendent registrar of marriages was next called. It appears that he did not enter the room until after they were all there, and, of course, he heard no threats uttered; but his evidence, which is not in entire accord with that of the petitioner, is strongly corroborative of her statement on some material points. With regard to the petitioner's appearance and demeanour he says:—"She undoubtedly shewed that she had some difference with respondent. She seemed rather excited. My impression was that she had just had something said to her which annoyed her. I should not say she was very excited. She was tapping her foot in a temper or annoyed." Further on, he says:—"She had her head half averted from the respondent all the time, like a lady who was annoyed. She took the ring off and threw it on the ground in a violent manner." Mrs. Butler was afterwards called, and stated as follows:—"On the 29th, the petitioner asked me to go for a walk with her. I went, and in Bond Street she told me she had to see a man about money just at the corner of the street, that she would not be absent more than five minutes. She was absent about twenty minutes or half-an-hour. She came back very excited and crying very much. She refused to tell what was the matter, but said, 'If you hear of my doing anything dreadful you will know I was not in my right mind.'" These are the facts of the case as sworn to by the petitioner and the witnesses on her behalf, and no evidence was offered in contradiction. The Solicitor General explained the non-appearance of the respondent in the witness-box (except for the purpose of making the one statement I have mentioned) by saying that whatever his desire to establish the validity of the marriage and to retain this lady as his wife may at one time have been, her evidence in Court and the dislike she has manifested for him have naturally made the respondent indifferent on the subject now. No doubt there is force in these observations. On the other hand, there is much in the evidence which no man possessed of one particle of self-respect would allow to pass uncontradicted if he were able to contradict it. He is charged with

conspiring with others to force this young lady into a marriage with himself which he knew to be repugnant to her feelings for the sole purpose of enabling him to raise money. He is charged, in furtherance of that scheme, with allowing her to be harassed and persecuted to the verge of despair to the serious and palpable injury to her health; with inveigling her into the registry office, and with having in that office threatened her life if she shewed the least sign of opposition to his wishes. Yet in answer to all this he offers not one word of contradiction, of explanation, or of excuse. This in the case of an ordinary contention between the two parties to a suit would be conclusive. In the present instance I feel that it places me in some difficulty. Of the existence of collusion between the parties to this suit—collusion to obtain the annulling of their marriage by misleading the Court—I have no suspicion; but I have some doubt whether I am in possession of all the facts which should be made known to me before I am asked to decide the question of the validity of that marriage. Nevertheless, I must act on the evidence before me. On that evidence I have come to a clear conclusion. It is that long before the ceremony was gone through the feelings of this young lady towards the respondent were such that of her free and unconstrained will she never would have married him; that she had been reduced by mental and bodily suffering to a state in which she was incapable of offering resistance to coercion and threats which in her normal condition she would have treated with the contempt she must have felt for the man who made use of them; and that, therefore, there never was any such consent on her part as the law requires for the making of a contract of marriage. Such being the case, I know of no consideration consistent with justice or with common sense which should induce me to hold this marriage binding. I declare the ceremony performed at the registry office null. I pronounce in favour of the prayer of the petition. I dismiss the respondent's counter-claim for the enforcement of conjugal rights, and I order him to pay the costs of the suit.

Solicitors for the petitioner: *Tidy & Tidy.*

Solicitor for respondent: *T. D. Dutton.*

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Dec. 4.

THE ENGLAND.

Co-ownership—Action of Restraint—Ship's Husband.

The plaintiff and all the other owners of a vessel appointed two persons as ship's husbands and managers by an agreement, which stated that they should be and at all times thereafter discharge the duties of ship's husbands and managers of the said vessel and of agents for the owners, their executors and administrators. The agreement also gave the managers authority to perform all the usual duties of ship's husbands:—

Held, that this agreement did not debar the plaintiff as owner of two sixty-fourth shares in the ship from obtaining in an action of restraint bail from the other part owners in the value of his shares.

Motion by the defendants in an action of restraint for their discharge from an undertaking to give bail. The plaintiff was the owner of two sixty-fourth shares in the steamship *England*, and being dissatisfied with the management of the vessel commenced an action of restraint for the purpose of obtaining bail in the value of his shares. The defendants, the owners of the remaining sixty-two sixty-fourths, through their solicitors gave an undertaking to put in bail. Before the vessel was built the plaintiff and the other owners had entered into an agreement with Messrs. Short & Dunn to act as ship's husbands and managers of the vessel when ready for use. The material parts of the agreement were as follows:—

"We, the undersigned, for ourselves and our executors, administrators, and assigns, hereby agree with Richard Short, ship agent, and Martin Dunn, ship agent, both of Cardiff, that they shall act as ship's husbands and managers of an iron screw steamer about to be built for us and themselves by Messrs. Davis & Co., but not yet named, but which is numbered 68 by the builders, and we further agree that the said R. Short and M. Dunn shall be and act at all times hereafter and discharge the duties of ship's husbands and managers for the said steamer and agents for the said parties undersigned, their executors, administrators, and assigns." The agreement then went on to empower Short and Dunn to remunerate and appoint the master and crew, and in all respects to have the entire management of the vessel, and fixed their remuneration.

Though the action was nominally defended by the owners of the vessel other than the plaintiff, the real defendants were Messrs. Short & Dunn, and the motion was made for the purpose of testing the right of the owner of a minority of shares to interfere with the managers of a vessel, who had been appointed under such an agreement as is above set out.

Sir W. Phillimore, and *Dove*, for the defendants. It is admitted that in ordinary cases the dissentient owner of a minority of shares has a right to have bail given to him for the value of his shares. But here the plaintiff has by the agreement with Short and Dunn debarred himself from the exercise of his ordinary rights, and he cannot object to the management of the vessel by them. [They referred to *The Innisfallen* (1); *The Talca*. (2)]

Barnes, for the plaintiff, was not called on.

THE PRESIDENT. The general principle in regard to the right of a part owner who dissents from the way in which the ship is employed is clear. He is entitled to bail in the value of his shares, he then incurs no liabilities and he obtains no profits. Clearly also it is possible for a part owner to bind himself not to exercise these legal rights, and it has been argued in the present case that there was an engagement by the plaintiff not to do so. But the duties of Messrs. Short & Dunn under the agreement must be exercised by some one, and this agreement does not prevent any dissentient part owner from exercising his legal rights, nor does it confer on Messrs. Short & Dunn an arbitrary and exclusive management of this vessel so long as she is in existence. If that were so, every part owner in the vessel might disagree with the management of the ship by Messrs. Short & Dunn, and yet be powerless to alter it. The motion must be dismissed with costs.

Solicitors for plaintiff: *Downing, Holman & Co.*
Solicitors for defendants: *Ingledew, Ince, & Colt.*

(1) Law Rep. 1 A. & E. 72. (2) 5 P. D. 169.

E. S. R.

1886
Dec. 8.

THE ISCA.

Towage—County Court Jurisdiction—32 & 33 Vict. c. 51, s. 2, sub-s. 1—Duty of Tug.

A county court has under 32 & 33 Vict. c. 51, s. 2, sub-s. 1, jurisdiction to entertain a claim for damage for breach of a contract of towage.

It is the duty of those on board the vessel in tow to give general directions to the master of the tug as to the towage. But the master of the tug should exercise his discretion as to the proper manœuvres to be employed, especially where he is more competent to form an opinion on this point than the master of the vessel in tow.

Appeal from a judgment of the county court judge sitting at Newport, Monmouth, on the 19th of June, 1886.

The appellant was the owner of the steam-tug *Isca*, and the respondents were the owners of the brigantine *Mary*. The action in the Court below was brought by the owners of the *Mary* against the *Isca* for damages caused to them by reason of the improper navigation of the tug, whereby the *Mary* came into collision with a bridge in the Usk, and was injured by it.

On the 19th of March, 1886, the *Mary* was alongside the Bangor Wharf in the River Usk, and as it was necessary to shift her lower down the river to the Great Western Wharf, the *Isca* was engaged to tow her down. The *Isca* began to tow the *Mary* down stream against the tide; owing to the mismanagement of the tug the *Mary* was drawn out into the tide, the tug was unable to hold her, and she drifted up the river and came into collision with the bridge in question. The learned judge found as facts that the master of the tug took on himself the whole management of the towing of the *Mary*, and that he gave orders; that the *Mary* was placed in danger by the tug; that the master of the *Mary* gave an order to the tug to keep her head out of the river, which was not properly obeyed; and that the towing was managed in an unseamanlike manner; and that the owners of the *Mary* were entitled to recover the damages claimed.

A. Thomas, for the appellant. A county court has no jurisdiction to try this case; it is not a claim arising out of the use and hire of a vessel within 32 & 33 Vict. c. 51, s. 2, sub-s. 1, upon

which section only the action is based. Secondly, if there is blame to be attached to the management of the tug, it is in law that of the vessel in tow, for it is the duty of those on the vessel in tow to give orders to the tug. The motive power only is in the tug, the governing or directing power is in the vessel in tow: *The Christina* (1); *The Energy.* (2)

[He also argued that the finding of the learned judge was against the weight of evidence.]

Barnes, for the respondents, was not called on.

THE PRESIDENT. The admiralty jurisdiction of the county courts was by 32 & 33 Vict. c. 51, s. 2, extended to "any claim arising out of any agreement made in relation to the use or hire of any ship." The claim in the present case is in my opinion plainly such a claim, and so the county court had jurisdiction over it. As to the law applicable to the present case, it has been contended that it is the duty of the vessel in tow to give directions to the tug. It is true that the general direction is to be given by those on the vessel in tow, and also if a specific order is given by her to the tug, the responsibility must rest with the vessel in tow for the consequences of such order. But it does not follow from this rule that the vessel in tow is to be constantly interfering with the tug, it must depend on the place and on the circumstances, as whether there are numerous small vessels about. Those in charge of the tug must exercise their judgment, and must not be constantly expecting to receive orders from the vessel in tow, which may be a considerable distance astern of them. In the present case, the vessel was in a narrow river in which it is difficult for a vessel to be brought down to a convenient turning-point. The proper place for such a manœuvre is obviously a matter of which the master of the tug would be the best judge, as he would be also of the manner in which the towage in such a place should be carried out. It would further be a question of fact whether the master of the tug had not taken upon himself the responsibility of managing both the tug and the vessel in tow. On this point the learned judge has arrived at a distinct conclusion, viz., that "the master of the tug took on himself the whole management of towing the brigantine,

(1) 3 Wm. Rob. 27. (2) Law Rep. 3 A. & E. 46.

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THE ISCA.

and that he gave orders." If he did so, then another question would arise, whether the master of the brigantine improperly interfered with the management of the master of the tug. This again is a question of fact, and I think that it is clear that the master of the brigantine did not in any way wrongly interfere with the management by the master of the tug. [The President proceeded to consider the evidence on this point.] The result, therefore, is that the judgment of the learned judge was right, and this appeal must be dismissed with costs.

BUTT, J., concurred.

Solicitor for appellant: *E. Warriner.*
Solicitors for respondents: *Downing, Holman & Co.*

E. S. R.

Nov. 11.

THE BERNINA.

Ship—Charterparty—Bill of Lading—Collision—Transhipment—Loss by Perils not previously excepted—Limitation Action—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 506—*Merchant Shipping Act,* 1862 (25 & 26 *Vict. c.* 63), *s.* 54.

A cargo was shipped by the plaintiff on the defendants' vessel under a charterparty and bill of lading, not excepting the negligence of the master and crew. During the voyage, and through the negligence of the masters and crews of both ships, the vessel came into collision with another, and was so much damaged as to render it necessary to discharge her cargo at a port of refuge, and, after temporary repairs, to complete the voyage in ballast. The master transhipped the cargo with the knowledge, but without the assent or dissent of the plaintiff, into three other vessels, under bills of lading excepting the negligence of the masters and crews. Two of these vessels with their cargoes were, through the negligence of their masters and crews, lost before reaching the port of discharge. The defendants obtained a decree limiting their liability arising out of the collision to 8*l.* per ton, and the proceeds were distributed to the claimants, of whom the plaintiff was not one. In an action for non-delivery of the portion of the cargo lost:—

Held, that the defendants were liable; for the loss did not arise from an excepted peril, and the transhipment, though justifiable, was for the purpose of earning the freight under the charterparty:

Held, also, that the judgment in the limitation action was no bar to the present claim, as the loss of the portion of the cargo, the subject of this action, was not caused by the collision in respect of which the defendants had limited their liability.

ACTION for breach of contract to deliver a quantity of iron ore. It appeared that the defendants' steamship *Bernina* proceeded

to Porman and there loaded a cargo of about 1700 tons of iron ore, belonging to the plaintiff, under a charterparty between the plaintiff and the defendants, dated August 18, 1884, and a bill of lading dated September 23, 1884, signed by the master, in both of which the perils excepted were "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation."

The *Bernina* left Porman for Cardiff, and on September 28, 1884, came into collision with the steamship *Bushire*, in consequence of which the *Bernina* was compelled to put into Lisbon and discharge her cargo, which, with the knowledge, but without the assent or dissent of the plaintiff, was subsequently transhipped by the master, as shipper, on three steamers, the *Avebury*, the *Curlew*, and the *Brixham*, and made deliverable to the order of the owners of the *Bernina*, the bills of lading excepting, in addition to the perils previously excepted, loss from any act of neglect or default by the master or mariners in the navigation. The plaintiff was not informed of this exception, and no evidence was offered that these bills of lading were in the customary form in use at Lisbon.

The *Curlew* duly reached her destination, but the *Avebury* and the *Brixham* were respectively lost, with their cargoes, on October 28 and November 6, 1884, through the negligence of those navigating them, and it was in respect of the non-delivery of the iron ore on board these two vessels, amounting together to 1147 tons, that the present action was brought.

On September 30 and October 10, 1884, respectively, actions were commenced in the Admiralty Division by the owners of the *Bernina* against the owners of the *Bushire*, and by the owners of the *Bushire* against the owners of the *Bernina*, and on the consolidated action coming on for hearing on November 20, 1884, the Court found both vessels to blame, and decreed accordingly.

On December 11, 1884, the defendants commenced an action in the Admiralty Division against the owners of the *Bushire* and others, to limit their liability to 8*l.* per ton.

On March 17, 1885, a decree in the limitation action was made by which it was decreed that the *Bernina* was entitled to limited liability "in respect of loss or damage to ships, boats, goods,

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merchandise, or other things caused by reason of the improper navigation of the said steamship *Bernina* on the occasion of the collision between that vessel and the steamship *Bushire*."

In accordance with the decree advertisements were issued, and on June 12, 1885, the plaintiff in the present action came in and appeared in the limitation action, but on June 24 he gave notice that he withdrew his appearance therein.

The amount brought into court in the limitation action was duly distributed on or before February 16, 1886, rateably amongst the several claimants preferring their claims in that action.

On July 17, 1885, the writ in the present action was issued.

It was admitted that the collision and the losses by the *Brixham* and *Avebury* occurred without the actual fault or privity of the defendants, and it was also admitted that the *Bernina* could not be repaired at Lisbon so as to carry on her cargo without so large an expenditure of money as to render it impracticable, and that she was obliged to proceed, after temporary repairs, in ballast to England.

Sir W. Phillimore, and *Aspinall*, for the plaintiff. There was no exception in the original charterparty and bill of lading as to the negligence of the master and mariners, and therefore the owners of the *Bernina* are liable for the non-delivery of the portion of the cargo which was transhipped in consequence of the collision and lost in the *Brixham* and the *Avebury*. The correspondence shews that though the defendants informed the plaintiff what the master of the *Bernina* was doing at Lisbon, no direction was asked of the plaintiff, and the defendants were left to complete their contract in the way they thought proper in order to earn the freight.

The cargo was not lost in or by the collision, but through the negligence of the masters and crews of two vessels into which the defendants elected to put the cargo. The masters and crews of these two vessels were in law the servants of the defendants, and their negligence is to be imputed to them.

Sect. 506 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and s. 54 of the Merchant Shipping Act, 1862 (25 & 26 Vict. c. 63), are to be read together, and in the light of the

decree in the limitation suit, the result being that the limitation of liability to 8*l.* per ton only relates to the collision between the *Bernina* and the *Bushire*. The whole cargo was safely landed at Lisbon after the collision, and the subsequent loss was due to other and different causes than either the collision or the exceptions in the original bill of lading.

Cohen, Q.C., and *Barnes*, for the defendants. As the ship was so much damaged as to be incapable of repair at the port of refuge, except at a very considerable cost, the master was at liberty to tranship the cargo: *Shipton* v. *Thornton* (1); *De Cuadra* v. *Swann*. (2) As the cargo was not of a perishable nature, it could be delivered in a merchantable condition, and it was therefore the duty of the master to do his best to carry it to its place of destination: *Tronson* v. *Dent*. (3) The position of a master towards the cargo, in respect of the reasonable care he is bound to bestow upon it, is summed up by Willes, J., in *Notara* v. *Henderson*. (4)

Though the proximate cause of the loss was the negligence of the masters and crews of the *Avebury* and the *Brixham*, the liability arose out of the original negligence in the collision which led to the transhipment, and, therefore, the cargo may be deemed to have been still on board the *Bernina*, so as to come within the words of s. 54 of the Merchant Shipping Act, 1862, see *Cannan* v. *Meaburn* (5), decided under the statute 53 Geo. 3, c. 159, for if the goods had been lost in the collision the limitation would apply, and it cannot be said that if part is saved and subsequently lost the liability is unlimited. In other words, the section of the statute applies, because the goods were laden on board under the contract to carry, and the original negligence entails all its consequences.

If the plaintiff's contention is logically carried out, then transshipment into a lighter renders the shipowner's liability unlimited; but the loss of the goods in the substituted vessel was caused by the original negligence, and for that the defendants are liable—that is, the cause of action is the loss by non-delivery

(1) 9 A. & E. 314.
(2) 16 C. B. (N.S.) 772.
(3) 8 Moo. P. C. C. 419.
(4) Law Rep. 7 Q. B. 225 (231).
(5) 1 Bing. 465.

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in consequence of original default, and the breach is the not carrying safely at the time of collision.

Sir W. Phillimore, in reply. The master in arranging for a sub-charter acts as agent for the shipowner, and not as agent for the owner of the cargo: *Matthews* v. *Gibbs*. (1) The authority to tranship is a power given to the shipowner to secure his freight. The defendants undertook to carry, certain perils only excepted, and the loss did not arise from those perils, nor do the words of the decree in the limitation action include the plaintiff's claim, for under the decree the defendants must shew that the loss was caused by the collision, which this loss was not. The cargo was not lost on board the *Bernina*, and therefore the loss does not come within the words of the statute; see *Morewood* v. *Pollok* (2), decided on the statute 26 Geo. 3, c. 86, s. 2.

Cur. adv. vult.

Dec. 7. THE PRESIDENT. This is an action by charterer against shipowners for non-delivery of cargo, though not prevented by any peril excepted by the charterparty.

The defendants in addition to denying their liability in respect of the non-delivery complained of, allege that if any liability attached to them, such liability has been limited to 8*l.* per ton by a decree in a limitation suit, of which the plaintiff might have had the benefit, and that, therefore, the plaintiff is precluded from maintaining this action.

The material facts are as follows:—[The learned judge here stated the facts as above set out.] I find that the transhipment of the cargo from the *Bernina* to the three other steamers was justifiable and prudent, and that the cargo was shipped in the three steamers on account of the defendants, and to enable them to earn their freight, and that it was not so shipped on account of the plaintiff.

The plaintiff is entitled to recover damages for breach of the contract entered into by the defendants to carry the plaintiff's cargo to its destination, unless the defendants can shew that they have been prevented from doing so by any of the excepted perils;

(1) 30 L. J. (Q.B.) 55. (2) 1 E. & B. 743.

and secondly, unless the proceedings in the limitation suit have deprived the plaintiff of the right to recover for such damage.

The collision between the *Bernina* and the *Bushire* did not prevent the defendants from performing their contract. The defendants were entitled to tranship the cargo into other vessels, as they in fact did, for the purpose of earning their freight; but if the collision had prevented the defendants from performing their contract, it would not have excused the defendants, as it did not arise from one of the excepted perils, and it was from the default of their servants that the defendants were obliged in their own interest to endeavour to complete the carriage of the cargo in vessels other than the *Bernina*.

In selecting these vessels the defendants exercised their own judgment, and made the masters and crew of the substituted steamers their agents for the purpose of completing their contract with the plaintiff.

The defendants were not entitled, as between themselves and the plaintiff, to substitute any other terms upon which the cargo was to be carried than those which had been agreed upon in the original charterparty and bills of lading of the *Bernina*, and thus the defendants could not free themselves from their liability under their original contract without shewing that the non-delivery of the cargo arose from perils excepted in that contract.

It is not necessary to consider what would have been the position of the parties if the *Avebury* and the *Brixham* had been lost by perils of the seas, because that is not the existing state of facts; those vessels, with the plaintiff's cargo, were lost through the fault or default of the defendants' agents, and therefore not by one of the perils for which the defendants had stipulated that they should not be liable.

This appears to me to reduce the question in the cause to the effect of the limitation action.

The material provisions of the Merchant Shipping Act, 1862, are as follows:—Sect. 54. "The owners of any ship . . . . shall not in cases where all or any of the following events occur without their actual fault or privity, that is to say . . . . where any damage or loss is caused to any goods, merchandise, or other

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things . . . . *on board any such ship* . . . . be answerable in respect of . . . . loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not to an aggregate amount exceeding 8*l.* for each ton of the ship's tonnage." And by the principal Act (1854) it is enacted (s. 506) that "the owner of every sea-going ship . . . . shall be liable in respect of every such . . . . loss of or damage to goods as aforesaid arising on distinct occasions, to the same extent as if no other loss, injury, or damage had arisen."

By the decree in the limitation suit the judge pronounced "that the owners of the *Bernina* were entitled to limited liability according to the provisions of the Merchant Shipping Acts, 1854 and 1862, and that in respect of loss or damage to ships, boats, goods, merchandise, or other things caused by reason of the improper navigation of the said steamship on the occasion of the collision between that vessel and the steamship *Bushire* on September 28, 1884, the owners of the said steamship *Bernina* are answerable in damages to an amount not exceeding 11,437*l.* 15*s.* 2*d.*, being at the rate of 8*l.* per ton," and the judge further ordered that advertisements should be published intimating to the persons having any claim in respect of loss or damage to ships, goods, merchandise, or other things caused as aforesaid, that if they did not come in before June 17 they would be excluded from sharing in the aforesaid amount.

It appears to me that this decree does not apply to the loss in respect of which the present plaintiff claims. His goods were not lost by reason of the improper navigation of the *Bernina* on the occasion of the collision; the goods were saved from the effects of that collision and were lost by reason of the improper navigation of the substituted ships, the masters and crews of which were the agents of the defendants. The defendants are not entitled to be put in a better position than if the *Bernina* had been repaired at Lisbon, and, after reshipping the cargo, had been lost by subsequent improper navigation, nor does the case come within the terms of the Act. The damage or loss to this cargo was not caused on board the *Bernina*, in respect of which the liability of the owners was sought to be and was

limited, but on board other ships to which the cargo was safely removed from the *Bernina*. I therefore give judgment for the plaintiff with costs.

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Solicitors for plaintiff: *Cooper & Co., for Ingledew, Ince, & Vachell, Cardiff.*

Solicitors for defendants: *Pritchard & Sons, for Bateson, Bright, & Warr, Liverpool.*

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[IN THE COURT OF APPEAL.]

Dec. 14, 15.

THE JOHANN SVERDRUP.

Tyne Pilotage Order Confirmation Act, 1865 (28 & 29 *Vict. c.* 44), *Sched.*, *s.* 16—*Merchant Shipping Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 39—41 *Geo.* 3, *c. lxxxvi.*

Under the Tyne Pilotage Order Confirmation Act, 1865, Sched., s. 16, pilotage is not compulsory on foreign vessels entering the Tyne.

So *held* by the Court of Appeal, affirming the judgment of the President and Butt, J.

APPEAL of the defendants from a decision of a Divisional Court sitting for the hearing of appeals in Admiralty from county courts, whereby it was held that pilotage was not compulsory on foreign vessels entering the Tyne. The question depended on the construction of the Tyne Pilotage Order Confirmation Act, 1865, sched., s. 16. The case in the Court below is reported 11 P. D. 49, where the Acts are set out.

Boyd, for the defendants, urged the same arguments as in the Divisional Court.

Barnes, for the plaintiffs, was not called on.

LORD ESHER, M.R. This case is a very clear one. It is immaterial what the rights and duties of the pilotage authorities of Newcastle-upon-Tyne were before the passing of the Merchant Shipping Act, 1862, for by s. 39 of that Act a new power was given to the Board of Trade to deal with almost every matter connected with pilotage in any particular locality. Among other things, they could exempt the masters and owners of all ships

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from employing pilots in any pilotage district. The simple question, then, is whether they have done so in the district of Newcastle-upon-Tyne. To ascertain this, it is necessary to turn to the Tyne Pilotage Order Confirmation Act, 1865 (28 & 29 Vict. c. 44). By this we find that a new corporate body is constituted, which thus clearly puts an end to the existence of the old Commissioners. Next, the Board of Trade formed a new pilotage district out of the old one for the purposes of the new Act, and to this new rules apply, and the jurisdiction in the new district is transferred to the Commissioners incorporated by the new Act. Then we come to s. 12, by which "all pilots licensed for the Tyne shall be entitled to continue to act as such pilots under the Commissioners incorporated by this order for one year after the commencement of this order without further licence or payment in respect of that year." This section applies only to the pilots' fees. The Board of Trade was empowered also to make a table of pilotage rates, which they did by s. 15; but it is absurd to suppose that it was intended that there should be two scales in force. Negative words were not needed to do away with the old scale, because the making of a new scale in itself abolished the old scale. Then we come to s. 16, which runs thus: "Nothing in this order shall extend to oblige the owner or master of any vessel to employ or make use of any pilot in piloting or conducting such vessel into or out of the said district or within any part thereof, if he is not desirous so to do, or to pay any pilotage dues when not employing or making use of a pilot." Now the very essence of compulsory pilotage is that the master of a vessel is bound to take a pilot at regular fixed rates, and if he does not do so he must still pay these rates. Clearly this 16th section is intended to carry out the objects of 25 & 26 Vict. c. 63, s. 39, sub-s. 4. It can have no power or effect unless it does this, and might be struck out as useless. The meaning of it clearly is that no vessel coming into the Tyne shall be obliged to take a pilot or though he does not, shall still pay rates. It has been argued that s. 22 alters the force of the 16th section; but this is a general clause, and does not annul or alter a particular section such as the 16th. Thus s. 16 abolishes compulsory pilotage in the Tyne, and its force is not diminished by any succeeding

section. On these grounds this appeal must be dismissed with costs.

LINDLEY, L.J. I am of the same opinion. I am unable to reconcile s. 16 of the Tyne Pilotage Confirmation Act with the 41 Geo. 3, c. lxxxvi., s. 6, which was in force up to 1865. The rates in force after that year are those mentioned in s. 15 of the Act of 1865, and s. 16 takes away any obligation to pay rates for pilotage when a pilot is not employed. If compulsory pilotage still, as was argued, is in existence, it is impossible to give any force or meaning to these two sections, because shipowners would, if pilotage were compulsory, be bound to pay rates. Therefore it is clear that compulsory pilotage was abolished in the Tyne after 1865.

LOPES, L.J. The case seems to me to be disposed of by s. 39 of the Merchant Shipping Act, 1862, and s. 16 of the Tyne Pilotage Act, 1865. Reading these two sections together, it is obvious that by the first it was intended that the Board of Trade might abolish compulsory pilotage, and by the second they carry into execution the power given to them. If this is not the effect of s. 16, it can have no meaning, and I can feel no doubt that it was intended to and does abolish compulsory pilotage in the Tyne.

Appeal dismissed.

Solicitors for plaintiffs: *W. A. Crump & Son.*
Solicitors for defendants: *Gregory & Co.*

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Dec. 14.

[IN THE COURT OF APPEAL.]

THE INDUS.

Ship—Collision—Vessel at Anchor—Burden of Proof—Compulsory Pilotage.

In an action for damage by collision it appeared that the defendants' vessel while in motion came into collision with the plaintiffs' vessel, which was at anchor:—

Held, that the fact that the plaintiffs' vessel at the time of the collision was at anchor and could be seen was primâ facie evidence of negligence on the part of the defendants, and that the burden of proof was then upon them to rebut the presumption of liability, by shewing either that the collision was occasioned by no fault on their part, or that it was due to inevitable accident, or that it was solely the fault of a pilot who was on board their vessel by compulsion of law.

Clyde Navigation Co. v. *Barclay* (1 App. Cas. 790) considered.

Appeal by the plaintiffs in an action of collision from a judgment of the President, whereby he gave judgment for the defendants on the ground that the plaintiffs had not proved any negligence on the part of the defendants. The plaintiffs were the Corporation of the Trinity House, and the defendants were the owners of the *Indus*. At the trial of the action the plaintiffs called one witness only, who proved that on the night of the 20th of June, 1884, he was on the *Girdler* lightship in the Thames, that her lights were burning brightly, and that she was run down by the *Indus*. The learned President, after hearing the evidence adduced on behalf of the defendants, found that the case had not been established against the defendants; at the same time he did not find what was the cause of the collision.

Sir R. Webster, A.G., and *Bucknill, Q.C.*, for the plaintiffs. The plaintiffs made out a primâ facie case of negligence against the defendants; if there is doubt as to the cause of the collision then there should have been judgment for the plaintiffs, because the burden rests on the defendants to shew affirmatively that there was negligence on the part of the plaintiffs, or that the collision was the result of an inevitable accident, in order to displace the case made against them: *The Batavier* (1); *The Loch*

(1) 2 Wm. Rob. 407.

Libo (1); *Bill* v. *Smith*. (2) Neither have the defendants shewn that the collision was solely the fault of a pilot who was on board by compulsion of law; to leave it open to doubt whether the collision might not have been caused by the fault of the pilot is not enough to entitle them to exemption from liability: *Clyde Navigation Co.* v. *Barclay*. (3)

Sir W. Phillimore, and *Kennedy, Q.C.*, for the defendants. It is admitted that the onus was on the defendants, after the plaintiffs had made out a primâ facie case, to prove that the accident was caused by the fault of the pilot, or by an inevitable accident, but if the matter is left in doubt that is sufficient: *The Bolina* (4); *The George* (5); it is not necessary for the defendants to prove which was the cause of the collision, if it can be assumed that it was one or the other. The onus was here sufficiently displaced, and there was established "the want of proof" by the plaintiffs which entitled the defendants to judgment: *The Daioz*. (6)

[They also referred to *The Winston* (7), and *The Catherine of Dover*. (8)]

Bucknill, Q.C., in reply.

LORD ESHER, M.R. I am of opinion that in this case the defendants did not discharge the burden of proof which was on them. It was incumbent on the plaintiffs to make out a primâ facie case, one which if unanswered would entitle them to judgment. They therefore gave evidence that their vessel was at anchor and was shewing a proper light. Under these circumstances, the defendants' vessel being in motion, in my opinion, and as it has frequently been held, the plaintiffs had established a primâ face case of negligence against the defendants' vessel. It is the duty of a vessel in motion to keep clear of one at anchor, if the latter can be seen, and if she does not keep clear then she must shew good cause for not doing so. In what way, then, could the defendants justify themselves? They could say that everything was done which could be done by careful seamen, but that some

(1) 3 Wm. Rob. 310.
(2) 39 Connecticut Rep. 206.
(3) 1 App. Cas. 790.
(4) 3 Notes of Cases, 208.
(5) 4 Notes of Cases, 161.
(6) 3 Asp. Mar. Cas. 477.
(7) 8 P. D. 176.
(8) 2 Hagg. 145 (154).

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overwhelming storm occurred which prevented the ship from being navigated as she ought to have been. They could say that an entirely unforeseen accident, which could not have been prevented by proper management, occurred to the machinery with the same result. There are yet other things which may be classed under the head of law known as inevitable accident, which is a well-known expression, and though it may not be philosophically correct, answers its purpose. But the defendants must clearly prove the occurrence of such an inevitable accident. In the present case the learned President seems to have left it as an alternative possibility, that the collision was caused by an inevitable accident. The inevitable accident suggested is that the machinery was out of order, that is to say that though it had been working perfectly well, something occurred at the particular moment of the collision which prevented it from doing what every one might reasonably expect it would do. In my opinion there was no evidence to support such a suggestion. The machinery acted well from Dundee to London, and down the river till the accident happened, and afterwards on the whole voyage to Australia. It is therefore necessary to presume that an inevitable accident occurred once only, and at the most critical moment; in my opinion there is no evidence to support such a presumption. Therefore the defence of inevitable accident was not proved. In what other way, then, could the defendants discharge their burden? They could shew that they had a licensed pilot on board, that he was there by compulsion of law, and that the accident occurred solely through his negligence. The defendants must give evidence which, if unanswered, would support that proposition; they must shew that the fault was one in regard to the navigation of the ship—as to the steering, because that is the only matter over which the pilot has a control, that the fault was his alone, and that he at the time was in charge of the navigation. If the defendants prove that the pilot gave orders and that they were obeyed, they make out a primâ facie case of negligence on his part. But if they only prove that the pilot gave orders, without also proving that they were obeyed, they do not even make out a primâ facie case that the collision was solely the fault of the pilot. They may have shewn that the pilot

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was in fault, but not that he was solely in fault. In the present case the defendants gave evidence that the pilot gave the orders as to the steering of the vessel, and that they were immediately obeyed. But then the further question arises as to whether the evidence so given was such as the Court can accept. [The Master of the Rolls proceeded to consider the evidence, and continued:—] So far from thinking with the learned President that there was a doubtful alternative, the evidence, when examined carefully, proves with a reasonable certainty, sufficient for the Court to act on, that the order to put the helm hard-a-starboard was given nearly half-a-mile from the lightship, and that it was not in fact obeyed. If that disobedience to the pilot's orders contributed, as I think it did, to the collision, it cannot be said that it was caused solely by the default of the pilot, and the defendants have not satisfied the burden of proof which lay on them. Therefore, I think the plaintiffs were entitled to judgment, for they made out a primâ facie case against the defendants, and the latter have not rebutted it. With regard to the cases which have been cited at the bar, none of them seem to be contrary to the proposition I have already laid down. The case of *Clyde Navigation Co.* v. *Barclay* (1), amounts, in my opinion, to this, that where the plaintiffs make a primâ facie case, and the answer is that the defendants are exempt from liability on the ground of compulsory pilotage, and they give evidence which primâ proves that the accident was solely the fault of a pilot who was on board by compulsion of law, the burden of proof is then shifted back on to the plaintiffs if they allege that the defendants were guilty of some other act of negligence. That seems to be the meaning of that case; it does not alter the general and long accepted rules as to the burden of proof which I have already stated. For these reasons I think that this appeal should be allowed.

LINDLEY and LOPES, L.JJ., concurred.

Appeal allowed.

Solicitors for plaintiffs: *Sandilands & Co.*
Solicitors for defendants: *T. Cooper & Co.*

(1) 1 App. Cas. 790.

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THE ANNIE.

Salvage—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 459—*Wreck raised by Thames Conservators—Damages recovered from wrongdoing Ship.*

The defendants' vessel having been sunk in the River Thames by a collision occasioned by the fault of another vessel, the Conservators, acting under 20 & 21 Vict. c. cxlvii. s. 86, caused it to be raised and sold, and the proceeds of the sale being insufficient to defray the expenses of raising it, they recovered, under s. 86, the amount of the deficiency from the defendants. The defendants on their part recovered the full value of their vessel from the owners of the vessel which was to blame for the collision.

In an action for salvage in respect of the preservation of the lives of the crew of the defendants' vessel at the time of the collision:—

Held, that the salvors could not recover; that the defendants' vessel not having been saved there was nothing to which the claim for life salvage could attach; and that it could not be preferred against the defendants in respect of the amount recovered as damages from the vessel to blame for the collision.

MOTION for judgment in an action of salvage, transferred from the City of London Court under 31 & 32 Vict. c. 71. The hearing of the action took place in the City of London Court, when the learned judge awarded the plaintiffs 30*l.*, subject to the opinion of the High Court on an agreed statement of facts. It appeared that the vessel *Annie* was run into and sunk in the Thames by the steamship *Recepta*. Her master and crew were saved by the plaintiffs, the owners, master, and crew of the tug *Storm Cock*. The *Recepta*, in an action by the owners of the *Annie*, was held solely to blame for the collision, and the plaintiffs recovered the full value of their ship and cargo, the *Annie* being treated as a total loss. The wreck was raised by the Conservators of the Thames, at an expense of 149*l.* (in the exercise of their powers under 20 & 21 Vict. c. cxlvii. s. 86), and was sold by them for 92*l.*; the balance was paid by the owners of the *Annie* to the Conservators, and was subsequently received by them from the owners of the *Recepta*. The owners, master, and crew of the *Storm Cock* then brought this action in rem for life salvage in the City of London Court, but did not arrest the wreck.

Raikes, for the plaintiffs. The plaintiffs are entitled to recover from the defendants the amount of the salvage awarded to them.

It is not necessary that the ship should be arrested; so long as something is saved, a claim for life salvage can be sustained: *The Hope* (1); *The Trelawney.* (2) Secondly, the owners of the *Annie* have recovered her value from the owners of the *Recepta*, and they therefore hold such sum subject to the claim for life salvage: *The Empusa.* (3)

Pyke, for the defendants. The plaintiffs are not entitled to recover salvage. The value of the ship was insufficient after payment of all necessary expenses within the meaning of the Merchant Shipping Act, 1854, s. 459 (4), to support a claim for salvage services. The law is not altered by that section, for there is still no personal liability to pay salvage, and that section only refers to the priority of life salvage: *The Cargo ex Schiller.* (5)

THE PRESIDENT. I feel no doubt as to this case. There can be no claim for salvage services against a person; something must be saved to which the claim can attach. In the present case the *Annie* was not saved; yet those who claim salvage do so in respect of a life salvage service. The claim by the owners of the *Annie* against the *Recepta* was one for damage caused by the collision, and the damages recovered by them were in respect of the total loss of their vessel. To these a claim for life salvage cannot attach. Now s. 459 of the Merchant Shipping Act, 1854, is as follows :—[THE PRESIDENT read the section.] In the present case the *Annie* being at the bottom of the Thames the Conservators in fulfilment of a public duty raised the wreck, as being an obstruction to the navigation of the river, and they had statutory power to sell the property raised and to recover any

(1) 3 C. Rob. 215.

(2) 3 C. Rob. 216, n.

(3) 5 P. D. 6.

(4) 17 & 18 Vict. c. 104, s. 459: "Salvage in respect of the preservation of the life or lives of any person or persons belonging to any such ship or boat, as aforesaid, shall be payable by the owners of the ship or boat in priority to all other claims for salvage; and in cases where such ship or boat is destroyed, or where the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of the salvage due in respect of any life or lives, the Board of Trade may in its discretion award to the salvors of such life or lives out of the Mercantile Marine Fund such sum or sums as it seems fit, in whole or part satisfaction of any amount of salvage so left unpaid in respect of such life or lives."

(5) 2 P. D. 145.

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expenses in excess of the proceeds of such sale from the owners of the wreck. The latter have recovered this amount from the owners of the *Recepta*. But that is a totally different transaction. I am clearly, therefore, of opinion that the present plaintiffs have no claim as against the Conservators of the Thames, whose rights are superior to those of all other persons. The section which I have read refers only to salvage claims, and that of the Conservators is not such a claim, but a charge for the benefit of the public. The plaintiffs' claim, therefore, entirely fails, and the defendants are entitled to judgment with costs.

Solicitors for plaintiffs: *Lowless & Co.*
Solicitors for defendants: *Botterell & Roche.*

E. S. R.

Dec. 20.

THE WERRA.

Salvage—Principles on which Salvage is awarded—Value of Property saved—Perils of Salving Ship—Possibility of Assistance—Character of Service rendered.

In estimating the amount of a salvage remuneration the Court takes into consideration, first, the value of the property saved, and next the actual perils from which it has been saved. In considering the perils, the possibility of assistance being rendered to the vessel in peril must be taken to lessen the amount to be awarded. The value of the salving ship will not substantially affect the amount of the reward, but the length of time to which she is exposed to additional risks is a material element for consideration.

ACTION of salvage.

The plaintiffs were the owners, master and crew of the steamship *Venetian* of 2733 tons nett and 4135 tons gross register, with engines of 600 horse-power nominal and 2400 horse-power actual. She was manned by a crew of fifty-five hands at the time of the services rendered, and had also on board sixteen cattle-men, seven stowaways, and a general cargo, and was on a voyage from Liverpool to Boston. Her value was 70,000*l.*, the value of her cargo 20,166*l.*, and of her freight 1103*l.* The *Werra* was a steamship belonging to the North German Lloyds Steamship Company of 2856 tons nett and 5109 tons gross register, manned by a crew of 175 hands. She was at the time the services were

rendered on a voyage from Bremen to New York. She had 544 passengers on board, and her steam-power had broken down. The value of the *Werra* was taken by the President to be 125,000*l.*, of her cargo 114,145*l.*, and of her freight 1364*l.* The *Venetian* fell in with the *Werra* in the Atlantic Ocean in lat. 44.00 N. and long. 47.57 W. on July 31, 1886, and towed her to Boston, a distance of 1000 miles, which port was reached on August 7. The weather during the towage was moderate with the exception of one gale on August 4, and there was a dense fog from time to time.

Sir R. Webster, A.G., Sir W. Phillimore, and *Aspinall,* were for the plaintiffs.

Myburgh, Q.C., and *Raikes,* were for the defendants.

THE PRESIDENT. The magnitude of the values at stake, and the fact that an important foreign company is interested in this suit, render it desirable that I should state, at greater length than I usually think is necessary, the principles by which the Court is guided in awarding salvage. The first thing to be considered is the value of the property saved; by that I do not mean that it is to be taken as absolutely the most important element, but that it is the subject-matter in respect of which the action arises. It is the fund which has to be dealt with and to be divided between the owners and the salvors who have acquired a claim upon it.

In the present case, I am obliged to some extent to conjecture the value of the *Werra.* She has indeed been valued in the United States at 104,000*l.*, but I think that this estimate is too low. On the other hand the owners, at the beginning of this year, placed her value at 140,000*l*, but this I considered too high an estimate. I think that I am making a liberal allowance from the value put on the *Werra* in her owners' books when I take it, for the purposes of this action, at 125,000*l.* There is no dispute as to the cargo or freight, and the passengers' fares were prepaid and not at risk. The total value of the property saved is therefore 240,500*l.*

The next question is as to the actual perils from which the *Werra* has been saved. It appears both to me and to the Trinity

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Brethren, that she was not saved from actual imminent risk. She had lost her propelling power, which I have often had occasion to say reduces a steamer to such a condition of impotence that to take her from the situation in which she is placed is a service which entitles those who perform it to a salvage reward. The *Werra* had some sailing powers, but I am advised that she could not have reached her destination by that means alone. On the other hand, it is possible that she might have been able to reach the coast of Europe if her master had made up his mind to abandon the voyage on which his vessel had started. But, having regard to the large number of passengers on board, the captain did no more than his duty by endeavouring to prosecute the voyage, and he exercised a wise discretion in accepting assistance which enabled him to accomplish it. It has been proved that there was no risk of starvation—or indeed of hardships—to those on board, for the *Werra* had forty days' provision on board and a cargo which would have yielded food for any length of time. This vessel was therefore not saved from imminent danger. But she was exposed to two kinds of risks whilst she was endeavouring to hold her ground till she fell in with the *Venetian*—risks arising from fog and from ice, of coming in contact with other vessels or with icebergs. So far as the latter are concerned, the *Werra* would be in no great danger of damage, because she could do no more than drift slowly along. It does not appear that the *Werra* saw any other vessel until some time after the *Venetian* fell in with her, perhaps because there was so much fog. It is alleged, on the one hand, that the *Werra* could easily have been picked up, and, on the other, that she would have had to pay salvage services to another vessel. The latter argument is true, but yet the possibility of another vessel's assistance being obtained tends to lessen the salvage reward. If two masters were bargaining as to payment for salvage services, the possibility of obtaining other assistance would induce the proposed salvor to offer reasonable terms. The Court also must take this possibility into consideration.

Having thus dealt with the risks of the *Werra* and with her position, I have now to consider what sacrifices and what risks were incurred by the *Venetian* in rendering these services. Her

value must be taken into consideration, though it does not largely increase the amount of the reward, and that only in so far as it may expose the owner of the salving ship to risk of greater loss. It is also said that the *Venetian* was detained three days on her voyage and that this detention should be paid for by way of demurrage. She was able, however, to reach Boston in time for the fulfilment of her contracts, and to sail on her regular day, so that in this case there can scarcely be said to be any ground for taking detention into consideration. It is further said that some part of the life of her machinery was, so to say, sacrificed, but this is a small matter scarcely worthy of consideration. The *Venetian*, however, was exposed longer to the risks of navigation, from fog, and from icebergs, through rendering this service, than if she had not taken the *Werra* in tow, and she was exposed to them—having her in tow—in circumstances of more than usual difficulty. Then the *Venetian* towed the *Werra* a very long distance, viz. 1000 miles. There was some heavy weather, amounting on one occasion, to a moderate gale, but for the most part the voyage was not made under exceptionally dangerous conditions. Her rate of speed during the performance of the service goes far to shew that she was able to maintain an average speed, which her captain says he kept up because of the pressing necessity of getting the *Werra* into a place of safety, and undoubtedly, having regard to the fact of the large number of passengers on the *Werra*, it was the duty of the master, as well as to the interest of her owners, that these passengers should arrive at their destination as soon as possible. Considering all these various circumstances, the reward to the salvors should be a liberal one, for it is desirable that owners of vessels should encourage their captains to render services to vessels in distress. I therefore award the sum of 7000*l.*: I apportion it as follows—5250*l.* to the owners, 583*l.* to the master, and 1167*l.* to the crew.

Solicitors for plaintiff: *Gregory, Rowcliffes, & Co.*
Solicitors for defendants: *Clarkson, Greenwell, & Wyles.*

E. S. R.

1887
Jan. 18, 19.

THE AGNES OTTO.

Collision—Pilotage—International Rules for the Navigation of the Danube, Arts. 85, 89, 92.

By arts. 85, 89, and 92 of the International Rules for the Navigation of the Danube, pilotage is compulsory in the case of a vessel navigating the Danube, but the master of such a vessel is not required to give up the navigation of it to the pilot. Where, therefore, the master of such a vessel has in fact given up the navigation of it to a pilot the owners remain answerable for damage caused by the improper navigation of the pilot.

ACTION of damage by collision.

The plaintiffs were the owners of the steamship *Fitzjames* and the defendants were the owners of the *Agnes Otto*. The collision took place in the Danube on May 12, 1886, near Galatz. Both vessels at the time of the collision were in charge of the pilots who were directing the navigation of the vessels. These pilots were on board under the provisions of the International Rules for the Navigation of the Danube. The rules applicable are arts. 85, 89, 92. (1)

The case is reported only with regard to the construction of above rules.

Sir W. Phillimore, and *Barnes,* for the plaintiffs.
Hall, Q.C., and *Aspinall,* for the defendants.

BUTT, J. (after deciding as a fact that both vessels were to blame, proceeded :—) There yet remains the question of pilotage to be considered. The owners of both vessels have claimed exemption from liability on the ground that their vessels were in charge of pilots employed by compulsion of law. In one sense pilotage is no doubt compulsory in the Danube, but the question

(1) Art. 85 : "In the case of steamers pilotage is compulsory both in ascending and descending the river."

Art. 89 : "The captain who has taken a licensed river pilot on board is none the less responsible for the observance of the regulations of navigation and police in force upon the Lower Danube."

Art. 92 : "The responsibility of the pilot is confined to pointing out the navigable channels and the peculiarities of the navigation of the river; a captain, therefore, who abandons the direction of his vessel to his pilot does so on his own responsibility."

is, whether the master of a vessel in that river is obliged to give up the charge of the navigation of the ship to the pilot. Rule 85 says that in the case of steamers pilotage is compulsory whether ascending or descending the river. If there had been no other rule I should have interpreted this as meaning that the pilotage was such as we are accustomed to in England, viz., a giving up of the navigation of a vessel to a pilot. But by rule 89 we find that a captain who has taken a pilot on board his vessel is none the less responsible for the observance of the Regulations for the Navigation of the Danube. By rule 92 the responsibility of the pilot is confined to pointing out the navigable channels and the peculiarities of the navigation of the river, and the captain who abandons the direction of the vessel to the pilot does so on his own responsibility. Apart, therefore, from any decisions of the Courts on cases analogous to this, I should have been of opinion that the true construction of these rules was, that the master of a vessel navigating the Danube is compelled to take a pilot on his vessel, but is not obliged to give up the navigation of the ship to him. The decision of the Court of Appeal in the case of *The Guy Mannering* (1) as to the interpretation of the Rules of the Suez Canal confirms me in this view. Therefore I must hold that neither of these vessels was in charge of a pilot by compulsion of law, and that both vessels must be pronounced to be to blame.

Solicitors for plaintiffs: *T. Cooper & Co.*
Solicitors for defendants: *W. A. Crump & Son.*

(1) 7 P. D. 132.

E. S. R.

1886
Nov. 8.
1887
Jan. 24.

[IN THE COURT OF APPEAL.]

THE BERNINA. (2)

Collision—Damages for Loss of Life—Improper Navigation—Both Ships to blame—Rights of Persons not responsible for Navigation of Ship—Lord Campbell's Act (9 & 10 *Vict. c.* 93), *s.* 1—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 9.

A collision having occurred through the fault of both vessels, two persons on board of one of them, an engineer and a passenger, who had nothing to do with the navigation, were drowned:—

Held, by the Court of Appeal (Lord Esher, M.R., Lindley and Lopes, L.JJ.), reversing the decision of Butt, J., that the deceased persons were not to be deemed to be identified with those in charge of the vessel on board of which they were, so as to debar their personal representatives from maintaining an action of negligence against the owners of the other vessel.

Thorogood v. *Bryan* (8 C. B. 115) and *Armstrong* v. *Lancashire and Yorkshire Ry. Co.* (Law Rep. 10 Ex. 47) overruled.

Held, also, affirming the decision of Butt, J., that actions under Lord Campbell's Act are not Admiralty actions, and are not affected by the Judicature Act, 1873, s. 25, and therefore that the Admiralty rule as to half damages does not apply to them.

Appeal from a judgment of Butt, J. (1), on a special case stated for the opinion of the Court in three actions brought in personam against the owners of the steamer *Bernina*. The first action was brought by the personal representative of J. H. Armstrong, an engineer on board the steamer *Bushire*, which came into collision with the *Bernina*. Through the collision Armstrong was drowned. The collision was caused through the fault of the master and crews of both vessels, but Armstrong had nothing to do with the navigation of the *Bushire*.

The second action was brought by the personal representative of Owen, the second officer on the *Bushire*, who was directly responsible for the negligent navigation of the *Bushire*, and who was drowned.

The third action was brought by the personal representative of Toeg, a passenger on the *Bushire* at the time of the collision, and who was drowned.

Butt, J., held on the authority of *Thorogood* v. *Bryan* (2), that

(1) Reported 11 P. D. 31. (2) 8 C. B. 115.

the plaintiffs were unable to recover against the defendants, and dismissed the actions.

The plaintiffs appealed.

1886. Nov. 8. *Bucknill, Q.C.*, and *Nelson*, for the plaintiffs. [They stated that the appeal would not be prosecuted on behalf of the representative of Owen.] The main question is, whether *Thorogood* v. *Bryan* (1) was rightly decided, for the learned judge held that he was bound by that decision. That case has been followed on many occasions, but it was wrongly decided, and has never been approved by a Court of Appeal. In *Spaight* v. *Tedcastle* (2) it was referred to without approbation, and though followed in *Armstrong* v. *Lancashire and Yorkshire Ry. Co.* (3), it was disapproved in *The Milan* (4) and in *Adams* v. *Glasgow and South Western Ry. Co.* (5) The assumption upon which *Thorogood* v. *Bryan* (1) is based, viz., that a passenger is identified with the driver of the vehicle in which he is, although the driver is not his servant but the servant of third parties, is a groundless fiction.

[They also referred to *Cattlin* v. *Hills* (6); Smith's Leading Cases, vol. i. 3rd ed., p. 132a, 8th ed., p. 316; and to the American cases, *Webster* v. *Hudson River Ry. Co.* (7); *Chapman* v. *Newhaven Ry. Co.* (8), and Bigelow on Torts, p. 728.]

Secondly, the case must be treated as if it were one in the Queen's Bench Division, and therefore the plaintiffs, if they can succeed, are entitled to recover the whole of the damages and not half only. The Judicature Act, 1873, s. 25, sub-s. 9, only applies to the Admiralty practice in regard to damage to ship or cargo.

Sir W. Phillimore, and *Barnes*, for the defendants. *Thorogood* v. *Bryan* (1) has been acted upon for many years, and the principle has been approved in several cases: *Spaight* v. *Tedcastle* (2); *Armstrong* v. *Lancashire and Yorkshire Ry. Co.* (3); *Waite* v. *North Eastern Ry. Co.* (9) The principle is correct, because the

(1) 8 C. B. 115.
(2) 6 App. Cas. 217.
(3) Law Rep. 10 Ex. 47.
(4) Lush. 388.
(5) 3 Court Sess. Cas. 4th Series, p. 215.
(6) 8 C. B. 123.
(7) 38 N. Y. Rep. (Tiffany's), 260.
(8) 19 N. Y. Rep. 341.
(9) E. B. & E. 719; 28 L. J. (Q.B.) 258.

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passenger voluntarily submits for the time being to the physical control of another person, and it is not reasonable that if through the contributory negligence of that person an accident happens the passenger should be entitled to recover from the other negligent party.

[They also referred to *Vanderplank* v. *Miller* (1); *Bridge* v. *Grand Junction Ry. Co.* (2); *Child* v. *Hearn* (3); and to the American cases, *Sampson* v. *Hand* (4); *Smith* v. *Smith* (5); *Colegrove* v. *New York Co.* (6); *Brown* v. *New York Central Ry. Co.* (7); *Mooney* v. *Hudson Ry. Co.* (8).]

Bucknill, Q.C., in reply.

Cur. adv. vult.

1887. Jan. 24. LORD ESHER, M.R. This was a special case, heard and determined by Butt, J., sitting in the Court of Admiralty. It appears from the case that three actions had been brought and entered in the Admiralty Division, each for damages against the owners of the ship *Bernina*, the actions being founded on Lord Campbell's Act. In the first Elizabeth Armstrong sued as administratrix of her husband on behalf of herself and children. In the second, Catherine Owen sued as administratrix of her husband. In the third Habiba Toeg sued as administratrix of her son. The collision took place between the *Bernina* and the *Bushire*, both British ships, and the collision was caused by the fault or default of the master and crew of the *Bushire*, and by the fault or default of the master and crew of the *Bernina*. Armstrong was one of the crew of the *Bushire*, but at the time of the collision was off duty, and had nothing to do with the negligence of the *Bushire* which partly caused the accident. Owen was second officer of the *Bushire*, and was at the time of the collision in charge of the *Bushire*, and was directly responsible for the negligence or carelessness which partly caused the collision. Toeg was a passenger on board the *Bushire*, and had nothing to

(1) M. & M. 169.
(2) 3 M. & W. 244.
(3) Law Rep. 9 Ex. 176.
(4) 6 Wharton, 310.
(5) 2 Pickering, 621.
(6) 20 N. Y. Rep. 492.
(7) 31 Barbour's Sup. Ct. Rep. 385, on appeal 32 N. Y. Rep. (Tiffany's) 597.
(8) 28 N. Y. Sup. Ct. (Robertson's) Rep. 548.

do with the negligent or careless navigation which partly caused the collision. Butt, J., gave judgment for the defendants in all three actions, in obedience to, but apparently without himself acquiescing in, the case of *Thorogood* v. *Bryan*. (1) It is evident from this statement that the question raised is, what is the law applicable to a transaction in which a plaintiff has been injured by negligence, and in the course of which transaction there have been negligent acts or omissions by more than one person?

Upon many points as to such a transaction the common law is clear. (1.) If no fault can be attributed to the plaintiff, and there is negligence by the defendant and also by another independent person, both negligences partly directly causing the accident, the plaintiff can maintain an action for all the damages occasioned to him against either the defendant or the other wrongdoer. (2.) If in the same case the negligence is partly that of the defendant personally and partly that of his servants, the plaintiff can maintain an action either against the defendant or his servants. (3.) If in the same case the negligence is that of the defendant's servants, though there be no personal negligence by the defendant, the plaintiff can maintain an action either against the defendant or his servants. (4.) If in the same case the negligence, though not that of the defendant personally or of a servant of the defendant, consists in an act or omission by another, done or omitted to be done in the way in which it is done or omitted to be done by the order or direction or authority of the defendant, the plaintiff can maintain an action either against the defendant or the person personally guilty of the negligence. (5.) If, although the plaintiff has himself or by his servants been guilty of negligence, such negligence did not directly partly cause the accident, as if, for example, the plaintiff or his servants having been negligent, the alleged wrongdoers might by reasonable care have avoided the accident, the plaintiff can maintain an action against the defendant. (6.) If the plaintiff has been personally guilty of negligence which has partly directly caused the accident, he cannot maintain an action against any one. (7.) If, although the plaintiff has not been personally guilty of negligence, his servants have been guilty of

(1) 8 C. B. 115.

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negligence which has partly directly caused the accident, the plaintiff cannot maintain an action against any one. (8.) If, although the defendant or his servants has or have been guilty of negligence, the plaintiff or his servants could by reasonable care have avoided the accident, the plaintiff cannot maintain an action against any one.

In all the propositions thus enunciated the persons named have been confined to the plaintiff, the defendant, and their servants, and in one an agent. It was laid down in *Quarman* v. *Burnett* (1) in 1840, that a defendant is only liable for the negligence of those who have the relation of servants to him as master, "upon the principle," it was said, "that qui facit per alium facit per se, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrongdoer—he who had selected him as his servant from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey, &c. But the liability by virtue of the principle of relation of master and servant must cease where the relation itself ceases to exist; and no other person than the master of such servant can be liable, on the simple ground that the servant is the servant of another and his act the act of another; consequently, a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable." And in *Reedie* v. *London and North Western Ry. Co.* (2), in 1849, "the liability of any one, other than the party actually guilty of any wrongful act, proceeds on the maxim qui facit per alium facit per se." . . . "But neither the principle of the rule nor the rule itself can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned." So stands the common law as to the rights and liabilities of a plaintiff in such actions, unless the case of *Thorogood* v. *Bryan* (3) is to be supported, by which, although the liabilities of such a plaintiff are not said to be increased, it is said that his rights

(1) 6 M. & W. 499.

(2) 4 Ex. 244.

(3) 8 C. B. 115.

are diminished. Before entering on the consideration of that and some other cases, it may be well to observe that in cases of injury by negligence the first point usually dealt with is whether there has been, in fact, any negligence by the defendant personally; secondly, or by his servants; then, thirdly, whether that negligence, if any, has been either wholly or partly directly a cause of the accident; fourthly, has the plaintiff personally or by his servants been guilty, in fact, of any negligence; fifthly, has such negligence, if any, either wholly or partly directly been a cause of the accident. In many of the cases with which we shall have to deal it will be necessary to observe which of those points has been in dispute, and if more than one has been in dispute, to distinguish that to which the judgment has been applied. The main question, however, before us is whether for any reason we think the case of *Thorogood* v. *Bryan* (1) can now be supported in a Court of Appeal.

Thorogood v. *Bryan* (1) and *Cattlin* v. *Hills* (2) were decided in 1849. The first was an action under Lord Campbell's Act against the owner of an omnibus. The facts were that the deceased got out of the omnibus in which he was a passenger while the omnibus was in motion, and without waiting for it to draw up to the kerb; and that the omnibus of the defendant coming up very fast at that moment the deceased was unable to get out of the way of it and was run over and killed. In summing-up, the learned judge, Vaughan Williams, J., told the jury that "if they were of opinion that want of care on the part of the driver of Barber's omnibus in not drawing up to the kerb to put the deceased down, or any want of care on the part of the deceased himself, had been conducive to the injury, in either of those cases, notwithstanding the defendant by her servant had been guilty of negligence, their verdict must be for the defendant." The jury gave a verdict for the defendant. A rule nisi having been obtained for a new trial on the ground of misdirection, on cause being shewn, Vaughan Williams, J., said:—"The objection to the summing-up applies to that part of it which relates to the want of care and caution on the part of the driver of Barber's omnibus. I acted upon the dictum of the Court of Exchequer

(1) 8 C. B. 115. (2) 8 C. B. 123.

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in *Bridge* v. *Grand Junction Ry. Co.* (1) If that be correct I was right." During the argument Cresswell, J., asked:—"Must not the negligence which is to exonerate the defendant, be negligence of the plaintiff, or his agent?" . . . . "It seems strange to say that A. shall not be responsible for his negligence, because B. has been negligent likewise, C. being the party injured." In *Cattlin* v. *Hills and Others* (2) the plaintiff was a passenger on the steamer the *Sons of the Thames*. A collision occurred with the *Sapphire*, belonging to the defendants, which struck the anchor of the *Sons of the Thames* projecting over the bow and knocked it down on the plaintiff's leg and crushed it. Cresswell, J., told the jury, amongst other things, that the plaintiff was not entitled to recover if they were of opinion that the damage sustained by the plaintiff had been occasioned by negligence on the part of those entrusted with the conduct and management of the *Sons of the Thames*. The jury gave a verdict for the plaintiff. A rule nisi was obtained by the defendants for a new trial for misdirection. The case is only reported with *Thorogood* v. *Bryan* (3) on account of the suggested acquiescence in it by Cresswell, J., of the doctrine adopted in *Thorogood* v. *Bryan*. (3) The first of these cases was tried after Trinity Term, 1848; the second after Michaelmas Term, 1848. Cause was shewn in both cases on June 20, 1849. During the arguments the note regarding *Bridge* v. *Grand Junction Ry. Co.* (1) of the then editors of Smith's Leading Cases, Willes and Keating, was read. The judgments were as follows: Coltman, J.:—"In *Thorogood* v. *Bryan* (3) the question raised is, whether a passenger in an omnibus is to be considered *so far identified with the owner*, that negligence on the part of the owner, or his servants, is to be considered negligence of the passenger himself. The law is that a party who sustains an injury from the careless or negligent driving of another may maintain an action, *unless he has himself* been guilty of such negligence, or want of due care, as to have contributed or conduced to the injury. In the present case, the negligence that is relied on as an excuse is not the personal negligence of the party injured, but the negligence of the driver of the omnibus in which he was a passenger. But it appears to me

(1) 3 M. & W. 244. (2) 8 C. B. 123. (3) 8 C. B. 115.

that, *having trusted the party by selecting the particular conveyance,* the plaintiff has *so far identified himself with the owner and her servants* that if any injury results from their negligence he must be considered a party to it. In other words the *passenger is so far identified with the carriage in which he is travelling* that want of care of the driver will be a defence of the driver of the carriage which directly caused the accident." Maule, J., said: "Although I at one time entertained a contrary impression, upon further consideration I incline to think that, for this purpose, the deceased must be considered *as identified with the driver* of the omnibus in which he voluntarily became a passenger, and *that the negligence of the driver was the negligence of the deceased.*" . . . "On the part of the plaintiff it is suggested that a passenger in a public conveyance *has no control over the driver. But I think that cannot with propriety be said.*" . . . "He enters into a contract with the owner, whom, by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance he is not obliged to avail himself of it." . . . "But *as regards the present plaintiff he is not altogether without fault;* he chose his own conveyance, and must take the consequence of any default of *the driver whom he thought fit to trust.*" Cresswell, J., said: "I must own I should not have been sorry if the point could have been raised on a bill of exceptions. The subject is an important one, and ought to be definitely set at rest." . . . "If the driver of the omnibus the deceased was in, had by his negligence or want of due care and skill, contributed to an injury from a collision, his master clearly could maintain no action. And I must confess I see no reason why a passenger, *who employs the driver to convey him,* stands in any better position." Vaughan Williams, J., said: "I think the passenger must, for this purpose, be considered *as identified with* the person having the management of the omnibus he was conveyed by."

The first observation to be made upon this case is that made by Cresswell, J., that, inasmuch as the judgment was given on a motion for a new trial for alleged misdirection, there being no bill of exceptions, it was not possible to carry the judgment to the Exchequer Chamber. Secondly, that although there was evidence in the case which shewed that the defendants' servant

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had been guilty of negligence partly directly causing the accident, and that the driver of the omnibus in which the plaintiff was a passenger was also guilty of negligence partly directly causing the accident, there was also evidence upon which the jury might well have found and probably did find that the plaintiff himself had personally been guilty of negligence partly directly causing the accident. But objection was taken to the summing-up, and the judgment was given in respect of the summing-up, and we must therefore confine our attention to the summing-up. Upon that summing-up, it is possible that the jury found for the defendant, although the plaintiff was in their opinion not personally guilty of any negligence, and in those days that possibility was sufficient to entitle the defendant to a new trial if that part of the direction was erroneous. Now it is plain that the driver of the omnibus in which the plaintiff was a passenger was not the plaintiff's servant. It is plain that the plaintiff had no legal power or authority to direct him how to drive, or when or where to stop. It is plain that the plaintiff did not in fact direct him. According to the judgment, the defendant was excused, although the owner of the omnibus, in which the plaintiff was a passenger, was only a contractor with the plaintiff to carry him, it being by the contract left to such owner to determine who should be the driver, and the manner of the driving, and although the driver of the omnibus was not the servant of the plaintiff, but was the servant of the owner of the omnibus. In the face of previous authorities, it was not then said, and is not now said, that the plaintiff could in such circumstances be made liable to any one else in respect of negligence of the driver; it is not said that the plaintiff could be made liable in any respect to or for the driver; but it is said that the conduct of that driver prevented the plaintiff from recovering, not from that driver's master, but from an independent wrongdoer who, by his servant's negligence, had injured the plaintiff. Coltman, J., states, as the ground of his judgment, that the plaintiff "having *trusted the party by selecting* the particular conveyance, had *so far identified himself with the owner and his servants*, that if any injury results from their negligence, he *must be considered a party to it.*" With great deference, this passage is so loosely worded, that it would make the plaintiff

liable to persons injured by the negligence of the driver, which was not intended by the learned judge. He then goes on to say: "In other words the passenger is so far *identified with the carriage* in which he is travelling, that want of care on the part of that driver will be a defence of the driver of the carriage which directly caused the accident." With regard to the phrase used by all the judges, of the plaintiff being identified with other persons, or with a carriage, it can be but a figure of speech. To say in any sense other than by way of an analogy contained in a figurative expression, that one man is identified with another, still more with a carriage, is absurd. What is obviously meant is, that the passenger is in the result in the same position as if he had been the owner or driver bringing the action. The figure describes the result, but, as is sometimes the case, the figure which describes the result is taken to be the enunciation of the principle which produces the result. The effect is that the result is made the reason for the result. In order, therefore, to be satisfied with the judgments in this case, we must look to the causes which are relied upon in them to produce the result. The sole cause stated by Coltman, J., is the selection by the plaintiff of the conveyance, and his thereby trusting the *party*, apparently meaning thereby the driver. As to the selection, it can hardly be said to exist in fact. There are not always two omnibuses starting at the same place and time on the same journey. Hardly ever two ships—never two railway trains. But if there be a selection, reliance on it seems to be opposed to a part of the judgment delivered by Parke, B., in *Quarman* v. *Burnett* (1): "As to the supposed choice of a particular servant, &c., it seems to us that if the defendants had asked for this particular servant amongst many, and refused to be driven by any other, they would not have been responsible for his acts and neglects. If the driver be the servant of a job-master, we do not think he ceases to be so by reason of the owner of the carriage preferring to be driven by that particular servant, where there is a choice amongst more, any more than a hack post-boy ceases to be the servant of an innkeeper where a traveller has a particular preference for one over the rest on account of his sobriety and carefulness." Return-

(1) 6 M. & W. 499.

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ing to *Thorogood* v. *Bryan* (1), Maule, J., says, that "the negligence of the driver was the negligence of the deceased." That, as above observed, is inaccurately worded. Then he says, "it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He enters into a contract with the owner, who by his servant, the driver, he employs to drive him." The learned judge could not have meant to state anything so preposterous as that the passenger has, in fact or even by agreement, any power or right to control the manner of driving of the driver. It is obvious that he again rests his conclusion upon the alleged selection of the conveyance. Then he further says: "But as regards the present defendant" (he means plaintiff) "he is not altogether without fault. He chose his own conveyance, and must take the consequences of any default of the driver, whom he thought fit to trust." Where is the fault, i.e., the want of care, in doing that which every passenger, however careful, who travels by omnibus, does and must do? Where is the trust in a man whom you cannot know beforehand, who can be changed at any moment during the journey without your knowledge or consent? And if this be applied, as a principle, to railways and ships, is not it still more glaringly untrue in fact? And, further, suppose it be admitted that the passenger does select, and thereby does trust, and is therefore guilty in that respect of want of ordinary care, how can it be said that any or all of these are in the end partly directly a cause of the accident? Cresswell, J., evidently desired that the question should be further considered. He does, however, speak of the passenger as of one "who employs the driver to convey him." It is not true in fact. Does a passenger by railway select or employ the engine-driver, or a passenger by ship select or employ the officer of the watch? Vaughan Williams, J., gives similar reasons. In truth the judgments in *Thorogood* v. *Bryan* (1) all amount to saying that by what the plaintiff did he made the driver his agent so as to be liable for his acts, as if he, the plaintiff, had himself done those acts. But if he did make him his agent at all, he must in consistency not only be by reason of such liability deprived of his remedy against third persons,

(1) 8 C. B. 115.

but must be affirmatively liable to third persons. In truth the driver in the case is not the servant or the agent of the passenger, and has not even any one of the attributes which are evidence of being even like a servant or agent. *Thorogood* v. *Bryan* (1) was stated by Vaughan Williams, J., to have been founded on a dictum of Parke, B., in *Bridge* v. *Grand Junction Ry. Co.* (2) It is sometimes also said to have followed *Butterfield* v. *Forrester*. (3) But the latter case deals only with the question of the plaintiff himself being the direct cause of his own injury, although there has been a previous negligence by the defendants. Only the plaintiff and defendant were concerned. It is not in point. In *Bridge* v. *Grand Junction Ry. Co.* (2), in 1838, the declaration was for injury by negligence of servants of the defendants in the conduct of a train of the defendants. The plea was, that the train of carriages, in one whereof the plaintiff was a passenger, did not belong to the defendants; nor was the same under the care and management of the defendants or their servants, but under the care and management of other servants; and that the persons who had the control and management of the train of carriages, in one whereof the plaintiff was then being carried, were guilty of negligence, &c.; and that in part by and through the negligence of the last-mentioned persons, as well as in part by and through the negligence on the part of the servants of the defendants, the collision, &c. Special demurrer, that the plea amounts to not guilty, that it is argumentative, alleges evidence, &c. During the argument Parke, B., said: "The question is whether the plea is not altogether bad in substance. It is consistent with all the facts stated in it that the plaintiff, *or those under whose guidance he was*, was guilty of negligence, and yet that the plaintiff is entitled to recover. Can it be said, that because a carriage is on the wrong side of the road a party is excused who drives against it. It ought to have been shewn that there was negligence in not avoiding the consequences of the defendants' default. The principle is very clearly laid down in *Butterfield* v. *Forrester*." (3) In giving judgment finally, Parke, B., said: "The plea undoubtedly amounts to the general issue. But I think it is also bad in

(1) 8 C. B. 115. (2) 3 M. & W. 244.

(3) 11 East, 60.

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substance, on the ground I before stated, that all the facts alleged in it may be true, there may have been negligence in both parties, and yet the plaintiff may be entitled to recover. The rule of law was laid down with perfect correctness in 1809 in the case of *Butterfield* v. *Forrester* (1); and the rule is, that, although there may have been negligence on the part of the plaintiff, yet unless he might by the exercise of ordinary care have avoided the consequences of the defendants' negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong." It is clear that the case dealt with the proposition laid down in *Butterfield* v. *Forrester* (1), a proposition wholly distinct from that in question in *Thorogood* v. *Bryan* (2). The only applicable words are those of Parke, B., which are in italics above, used during the argument, omitted in the final judgment. The suggestion contained in the words was challenged, before *Thorogood* v. *Bryan* (2) was argued in Banc, by the editors, Willes and Keating, of Smith's Leading Cases. In the note to *Ashby* v. *White* (3) they said, speaking of *Bridge* v. *Grand Junction Ry. Co.* (4): "A hasty perusal of the report of that case might lead to the supposition that, according to the opinion of the Court, the plea might have been made good in substance, though not in form, by an averment that the plaintiffs' driver could by ordinary care have avoided the accident; but that result does not by any means follow from what the learned judges said, much less from what they actually decided. It may perhaps, safely be asserted, that the plea was at all events bad in substance, for not alleging that the *passenger, who brought the action,* was guilty of negligence. If two drunken stage coachmen were to drive their respective carriages against each other, and injure the passengers, each would have to pay for his own carriage, no doubt; but it *is inconceivable that each set of passengers should, by a fiction, be identified with the coachman who drove them, so as to be restricted for remedy to actions against their own driver or his employer.*" This note has been adopted by every subsequent editor. I have been allowed by the kindness of his grandson

(1) 11 East, 60.
(2) 8 C. B. 115.
(3) Sm. L. C. (editor's note), vol. i. 3rd ed. p. 132 a.
(4) 3 M. & W. 244.

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to see the volume in which *Thorogood* v. *Bryan* (1) is reported, in Baron Parke's own library; and I have seen, in his own handwriting, "quære," written against the case, and also "see the note in Smith's Leading Cases." The inference seems to be, that he, upon whose casual dictum the case of *Thorogood* v. *Bryan* (1) is assumed to be founded, was not satisfied with the decision. In *Rigby* v. *Hewitt* (2), and *Greenland* v. *Chaplin* (3) in 1850, the point discussed was that raised in *Butterfield* v. *Forrester*. (4) They are not authorities in support of *Thorogood* v. *Bryan*. (1) In *Tuff* v. *Warman* (5), in 1857, the present point was not raised. The case is only useful for the remark of Vaughan Williams, J., when *Thorogood* v. *Bryan* (1) was cited: "That case," he said, "has been made the subject of some damaging remarks in the last, the 4th, edition of Smith's Leading Cases, vol. 1, p. 220 a." The note thus referred to was written after the decision in *Thorogood* v. *Bryan* (1), and is as follows: "If two drunken coachmen were to drive their respective carriages against each other and injure the passengers, each would have to bear the injury to his own carriage, no doubt; but it seems highly unreasonable, that each set of passengers should, by a fiction, be identified with the coachman who drove them, so as to be restricted for remedy to actions against their own driver or his employer. This nevertheless appears to be the result of the decision in *Thorogood* v. *Bryan* (1); but it may be questioned whether the reasoning of the Court in that case is consistent with those of *Rigby* v. *Hewitt* (2), and *Greenland* v. *Chaplin* (3), or with the series of decisions from *Quarman* v. *Burnett* (6) to *Reedie* v. *London and North Western Ry. Co.* (7) Why, in the particular case, both the wrongdoers should not be considered liable to a person free from all blame, not answerable for the acts of either of them, and whom they have both injured, is a question which seems to deserve more consideration than it received in *Thorogood* v. *Bryan*." (1) The case of *Waite* v. *North Eastern Ry. Co.* (8), in 1858, requires to be examined. It was an action on behalf of an infant by his

(1) 8 C. B. 115.
(2) 5 Ex. 240.
(3) 5 Ex. 243.
(4) 11 East, 60.
(5) 2 C. B. (N.S.) 740.
(6) 6 M. & W. 499.
(7) 4 Ex. 244.
(8) E. B. & E. 719.

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next friend. The plaintiff, an infant of five years, with his grandmother, who took a half ticket for the child and a ticket for herself, were run over by a passing train, as they were crossing the railway, the grandmother being killed. The jury, in answer to questions left to them by Martin, B., found that the defendants were guilty of negligence, that Mrs. Park, the grandmother, was also guilty of negligence, which contributed to the accident. No negligence of course was attributed to the infant plaintiff. A verdict was entered for the plaintiff with leave to move to enter it for the defendants. Lord Campbell, said: "We think the rule ought to be made absolute for entering a verdict for the defendants. The jury must be taken to have found, that Mrs. Park, the grandmother of the infant plaintiff, in whose care he was when the accident happened, was guilty of negligence without which the accident would not have happened; and that, notwithstanding the negligence of the defendants, if she had acted upon this occasion with ordinary caution and prudence, neither she herself nor the infant would have suffered. Under such circumstances, had she survived, she could not have maintained any action against the company; and we think that the infant *is so identified with her* that the action in his name cannot be maintained. The relation of master and servant certainly did not subsist between the grandchild and the grandmother; and she cannot, in any sense, be considered his agent; but we think, that the defendants, in furnishing the ticket to the one and the half-ticket for the other, did not incur a greater liability towards the grandchild than towards the grandmother; and that she, the contracting party, must be implied to have promised that ordinary care should be taken of the grandchild. We do not *consider it necessary to offer any opinion as to the recent cases in which passengers by coaches or by ships have brought actions for damages suffered from the negligent management of other coaches and ships, there having been negligence in the management of the coaches and ships in which they were travelling; as, at all events, a complete identification seems to us to be constituted between the plaintiff and the party whose negligence contributed to the damage, which is the alleged cause of action, in the same manner as if the plaintiff had been a baby only a few days old to be carried*

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in a nurse's arms." In the Exchequer Chamber, Mellish, for the defendants, commenced by saying, it was not necessary to determine whether *Thorogood* v. *Bryan* (1) was or was not correct. Cockburn, C.J., said: "I put the case on this ground, that *when a child of such tender and imbecile age* is brought to a railway station or to any conveyance for the purpose of being conveyed, and is *wholly unable to take care of itself*, the contract of conveyance is on the implied condition that the child is to be conveyed subject to due and proper care on the part of the person having it in charge. Such care not being used, *where the child has no natural capacity to judge of the surrounding circumstances*, a child might get into serious danger from a state of things which would produce no disastrous consequences to an adult capable of taking care of himself." Upon this case it must be observed, that the action was against the company with whom the contract for conveyance was made. It may be that the reasons given for this decision might also absolve an independent wrongdoer. But it would be strange to say that this case supports *Thorogood* v. *Bryan* (1) when the judges in one court and the counsel in the other declined to discuss that case. The case of the infant might be decided as it is, though *Thorogood* v. *Bryan* (1) were discarded. In *Child* v. *Hearn* (2) in 1874, the plaintiff, a plate-layer, in the employment of the Great Eastern Railway Company, was returning from his work upon the line on a trolley which was upset by the defendant's pigs escaping through the fence between the defendant's field and the railway. The case was heard before Barons Bramwell, Pigott, and Pollock. Bramwell, B., said, that it was the duty of the railway company to keep the fence in a reasonably fit condition; that by reason of their default their property, i.e., the railway, was not sufficiently protected; that if the plaintiff, who was on their property by their leave, was injured by reason of that want of protection, he could not maintain an action against the defendant. "Without saying," he said, "anything as to the decision in *Thorogood* v. *Bryan* (1), it is sufficient to say that the defendant's pigs escaped through the negligence of the plaintiff's employer, and that having met with the accident through his employer's negligence, the plaintiff

(1) 8 C. B. 115. (2) Law Rep. 9 Ex. 176.

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cannot maintain an action against the defendant." Pigott, B., said: "The defendant, then, it not being shewn that he has been guilty of any negligence, is not responsible to the plaintiff for the accident which has occurred." Pollock, B., said: "If the case were within the passage cited from Shearman and Redfield (1), this might be open to doubt; but that passage has no application to the present case, where the plaintiff met with his injury through being upon premises originally insufficiently protected by those in whose employment he was." The learned baron then gave an instance of a rotten carriage, by which he seemed to bring back the case to *Thorogood* v. *Bryan* (2), and then used the somewhat startling figure: "I think in such a case the person riding in the carriage," i.e. the rotten carriage, "would be identified with the carriage," i.e., the rotten carriage, "in which he was riding." In what respect, to what purpose, in regard to what liability or disability, is not stated.

The learned judge, in giving this analogy, was trying to avoid the difficulty of saying that the supposed plaintiff was identified with the driver or owner of a carriage in which he was a passenger. The carriage mentioned is therefore a carriage not belonging to the plaintiff or under his control. But then the carriage cannot be guilty of any negligence. There is no negligence with which to identify the supposed plaintiff. If the supposed carriage is one belonging to the plaintiff and there is negligence in using it in a rotten state, and such rottenness contributes to the accident, it is not a case in point. The passage from Shearman and Redfield on Negligence is as follows: "When the negligence of any other person is imputed to the plaintiff it must appear that such person was the plaintiff's agent in the transaction, and either that he was under the plaintiff's control, or that he controlled the plaintiff's conduct." Considering the facts of the case, and what was said by Bramwell and Pigott, BB., it cannot be fairly said that this case was decided on the authority of *Thorogood* v. *Bryan*. (2) In *Armstrong* v. *Lancashire and Yorkshire Ry. Co.* (3), in 1875, the plaintiff, a travelling inspector of the London and North Western Railway Company, in their train

(1) Law of Negligence, 2nd ed. p. 53, § 46.

(2) 8 C. B. 115.

(3) Law Rep. 10 Ex. 47.

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with a pass, was injured by the train in which he was, running into wagons of the defendants left standing at a crossway. The jury found joint negligence in the management. A verdict was directed for the defendants with leave to move. Bramwell, B., gave judgment discharging the rule, on the ground that the case could not be distinguished from *Thorogood* v. *Bryan*. (1) He made the important statement "that it must not be supposed that he was at all dissatisfied with *Thorogood* v. *Bryan*." (1) He somewhat diminished the importance of his assent, the first expressed by any English judge, by adding that "he also thought that the alleged negligence of the defendants' servants did not conduce to the accident, so that the sole negligence which caused the accident was that of those in charge of the London and North Western train." If this was so, the doctrine of *Thorogood* v. *Bryan* (1) was not wanted. Pollock, B., agreed on both points. But as to the doctrine laid down in *Thorogood* v. *Bryan* (1) he said: "The identification does not involve any volition on the part of the passenger. It merely means that he has equal rights with the driver." And again, "The only difficulty arises from the use of the word 'identified' in the judgment. If it is to be taken that by the word 'identified' is meant that the plaintiff by some conduct of his own, as by selecting the omnibus in which he was travelling, has acted so as to make the driver his agent, this would sound like a strange proposition which could not entirely be sustained. But what I understand it to mean is that the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus or his driver." This, no doubt, reiterates the result of the judgment in *Thorogood* v. *Bryan* (1), but, with deference, does not elucidate the means by which that judgment was arrived at, or explain the difficulties which have puzzled lawyers. Then comes the case of *The Milan* (2), in 1861. The action was brought in the Admiralty Court by the owner of cargo on board the *Lindisfarne* against the owners of the *Milan* for the loss of cargo as the result of a collision. Both ships were held to blame. Dr. Lushington, in considering the legal consequences of that finding, said: "The principle, I apprehend, of this rule of common law is,

(1) 8 C. B. 115.

(2) Lush. 388.

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that a party shall not recover where he himself is in any degree to blame for the loss. Now, cases apart, can it be reasonably contended that the owner of a cargo is responsible for the acts of the master and crew of the vessel in which his goods are laden, he himself not being owner or part owner of the ship? The owner of the cargo does not, it seems to me, commit any negligence contributing to the loss; certainly not by himself personally, certainly not by his agents; for the master and crew are in no respect under his control. It is difficult to conceive how it can be contended that he is particeps criminis when he is not so either as principal or agent. It is argued that he shall be so considered, and deprived of his remedy, because he himself, or his agent, selected the ship by which his goods were carried. But there is, in my judgment, in the mere selection of the ship for the conveyance of his cargo, none of the ingredients which constitute any kind of responsibility for a collision; for I cannot conceive a responsibility for an act done where the individual has not, either by himself or his agent, any power of interference or control. . . ." "I decline to be bound by *Thorogood* v. *Bryan* (1), because it is a single case; because I know upon inquiry that it has been doubted by high authority; because it appears to me not reconcilable with other principles laid down at common law; because it is directly against *Hay* v. *Le Neve* (2) and the ordinary practice of the Admiralty Court." It has been supposed that the ultimate judgment of Dr. Lushington was inconsistent with this stout disagreement, but he decided to give the plaintiff only half his loss upon wholly other grounds, peculiar to the Admiralty Court, namely, that it had always been the practice there, instead of saying that an innocent plaintiff might recover his whole loss against any one wrongdoer, to say that he must recover part from one and part from the others; and, if there are only two, half from each. He said, in terms, that the plaintiff must sue the owners of the ship in which his cargo was for the other half. In *Spaight* v. *Tedcastle* (3), in the House of Lords, in 1881, the action was by owners of a ship against the owners of her towing-tug. The ship was in charge of a compulsory pilot, who, it was alleged, had by negligence contributed to the injury. It was decided in an

(1) 8 C. B. 115. (2) 2 Shaw's Sc. Appeals, 395. (3) 6 App. Cas. 217.

elaborate judgment that there was no evidence of negligence by the pilot which had contributed to the accident. It was therefore not necessary to review the decision in *Thorogood* v. *Bryan.* (1) With regard to it Lord Blackburn said: "The counsel for the appellants did not rest their case on this point of law, and it was not argued at your Lordships' bar. It is one of general importance, and *if it were necessary to decide it either way I should wish to hear a further argument on the point.*"

These being the English cases it was interesting and profitable, as it always is, to consider the American cases. Several were cited to us, some before and some subsequent to *Thorogood* v. *Bryan.* (1)

In *Smith* v. *Smith* (2), in 1825, before the Supreme Court of Massachusetts, the action was for injury to the plaintiff's horse by an obstruction in the highway placed by the defendant. It raised the question decided in *Butterfield* v. *Forrester* (3), not the doctrine of *Thorogood* v. *Bryan.* (1) In *Simpson* v. *Hand* (4), in 1840, before the Supreme Court of Pennsylvania, the action was for injury to Spanish hides of the plaintiff on board the *Thorn*, against the owners of the *William Henry.* Contributory negligence was alleged, and that the *Thorn* was alone to blame. Gibson, C.J., said: "It is an undoubted rule that for a loss from mutual negligence, neither party can recover in a court of common law." . . . "*Vanderplank* v. *Miller* (5)," he says, "is an authority that the owner of goods on board cannot recover." He then says: "There is at least privity of contract between a merchant and his carrier; and the former, when he commits the management and direction of his goods to the latter, giving him as he does authority to labour and travail about the transportation of them, necessarily constitutes him to some extent his agent." It does not seem clear that the owner of cargo gives the authority suggested, if by it is meant the authority to an agent by a principal. The owner of cargo contracts with the shipowner that the latter will carry his goods; but the relation is that of co-contractors, not that of principal and agents. The case of *Chapman* v. *Newhaven Ry. Co.* (6), in June, 1859, was before the Courts of Appeal in New

(1) 8 C. B. 115.
(2) 2 Pickering's Rep. 621.
(3) 11 East, 60.
(4) 6 Wharton's Rep. 311.
(5) M. & M. 169.
(6) 5 Smith's Rep. 341.

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York on appeal from the Supreme Court of New York. The action was for damages from a collision between a train of the New York and Harlem Railway Company, in which the plaintiff was a passenger, and a freight train of the defendants. The plaintiff had a verdict and judgment at the trial before Duer, J., which were upheld in the Superior Court. In the Court of Appeal therefrom Johnson, C.J., said: "There was evidence of negligence in the management of each train, and the position on which the defendants rely is that such negligence on the part of the Harlem train as would preclude that company from an action against the defendants, will also preclude the plaintiff from sustaining his action. The general rule is, that one who receives an injury from the negligence of another may maintain an action for his damages. Upon this rule a natural and reasonable exception has been engrafted, that if the injured party by his own negligence has contributed to the injury he cannot maintain an action, unless the negligence of the other party has been so gross in its character as to be equivalent to a wilful injury. I do not think this exception, or any reasonable extension of it, can be applicable to the plaintiff. He was a passenger on the Harlem cars, conducting himself as he lawfully ought, having no control over the train or its management; on the contrary, bound to submit to the regulations of the company and the directions of their officers. To say that he is chargeable with negligence because they have been guilty, is plainly not founded on any fact of conduct on his part, *but is mere fiction!*" After discussing *Thorogood* v. *Bryan* (1) the Chief Justice says: "But I do not see the justice of the doctrine in connection with the case before us. It is entirely plain that the plaintiff had no control, no management, even no advisory power over the train on which he was riding. Even as to selection, he had only the choice of going by that railroad or by none. To attribute to him, therefore, the negligence of the agents of the company, and thus bar him of a right of recovery, is not applying any existing exception to the general rule of law, but is framing a new exception which does not in fact rest upon the reason of the original exception, *and is based on fiction and inconsistent with justice.*" Six judges were parties to this judgment. A more abso-

(1) 8 C. B. 115.

lute negation of every point seriatim in *Thorogood* v. *Bryan* (1) cannot be! In *Colegrove* v. *New York and Newhaven Ry. Co.* (2), in December, 1859, again before the Court of Appeals in New York, the question was whether the action could be maintained against both railway companies. The verdict and judgment for the plaintiff, a passenger on the New York and Harlem railway, were maintained and affirmed against the defendants. In *Frances Brown* v. *New York Central Ry. Co.* (3), in June, 1860, before the Supreme Court of New York, the plaintiff had employed Thomas, the owner and driver of a stage coach from Albion to Batavia, to carry her to Elba, a place between those villages, and had taken her seat in the stage with other passengers. The route was across the track of the defendant's railroad. The conductor of the railway train was dropping two cars at Albion. He performed the operation near the crossing, the train going fast. The driver of the coach attempted to cross in front of the two detached cars which were in motion, and was caught by them. It was contended for the plaintiff that, assuming both drivers to have been negligent, as the jury found, so as that the joint negligence produced the accident, the plaintiff was entitled to recover. This the Court denied on the authority of *Thorogood* v. *Bryan.* (1) The case was brought by appeal before the Court of Appeals of New York as *Brown* v. *New York Central Railroad Co.* (4), in June, 1865. Davis, J., said: "Since the trial of this action the decisions of this Court in *Chapman* v. *Newhaven Ry. Co.* (5) and *Colegrove* v. *New York and Newhaven Ry. Co.* (2) have been published.—I do not perceive why these cases do not dispose of the question as to the negligence of the driver in this case. The plaintiff was a passenger in a public stage; she had no control of its management or direction, and occupied no relation to the driver different from that which passengers occupy to any public carrier of persons. In principle there is no difference whatever between her relation to the carrier and that of a passenger on a train of railway cars. But a majority of the judges are of opinion that the true rule, *in a case of this kind*, was laid down at the circuit." The majority

(1) 8 C. B. 115.
(2) 6 Smith's Rep. 492.
(3) 31 Barbour's Rep. 385.
(4) 5 Tiffany's Rep. 597.
(5) 5 Smith's Rep. 341.

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could not have intended to overrule the former cases, and must therefore have seen some distinction, which escapes us, between this case and them.

The same difficulty seems to have been felt in America; for although one cannot on reflection suppose that the judges in the last case intended to impeach the previous recent decisions of their own Court, it was thought that they had so intended. In *Mooney* v. *Hudson River Railroad Co.* (1), in May, 1868, the action by the plaintiff was against two companies, the defendants and the Tenth Avenue Railway Company, in whose train he was a passenger. The verdict was for the plaintiff. On a motion for a new trial, questioning the judge's charge, in the Superior Court of New York, Robertson, C.J., said: "The Court in substance charged the jury that the defendants were jointly responsible, if they were both guilty of concurring negligence, and so the jury found. The charge was made pursuant to the decisions of the Court of Appeals in *Chapman* v. *Newhaven Ry. Co.* (2) and *Colegrove* v. *New York and Newhaven Companies* (3); but I understand the decision in the subsequent case of *Brown* v. *New York Central Ry. Co.* (4) to have in a great measure overruled those decisions." A new trial was ordered. The question, however, was again before the Court of Appeals of New York in *Webster* v. *Hudson River Railroad Co.* (5), in June, 1868. The plaintiff was a passenger by the Hudson and Boston Railroad. The negligence of the defendants was established and not questioned. The judge refused to charge, that if the Hudson and Boston Railroad Company, on whose train the plaintiff was a passenger, was also guilty of negligence, the plaintiff cannot recover against the defendants. This refusal was upheld by the General Term Court, and thereupon the appeal. Hunt, C.J., in the Appeal Court, said: "It is not pretended that the plaintiff was guilty of any personal negligence, or that it was within his power, by any means or in any degree, to have prevented the collision by which he was injured." . . . "The imputation to the plaintiff of the negligence of another is based upon no sound principle."

(1) 5 Robertson, 549.
(2) 5 Smith's Rep. 341.
(3) 6 Smith's Rep. 492.
(4) 31 Barbour's Rep. 385.
(5) 38 N. Y. Rep. (Tiffany), 260.

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The judge then declared that *Chapman* v. *Newhaven Ry. Co.* (1) and *Colegrove* v. *Harlem Ry. Co.* (2) were in point, and that *Brown* v. *New York Ry. Co.* (3) is not inconsistent with them. The verdict and judgment were affirmed. Since the argument before us we have seen the report of the case of *Little* v. *Hackett* (4), in January, 1886, before the Supreme Court of the United States, in error from the District Court of New Jersey. Field, J., gave the judgment: "The plaintiff below was injured by a collision between a train of the Central Railroad Company of New Jersey and a hack carriage in which the plaintiff was riding. The defendant legally represented the railroad company. The plaintiff had hired the public hackney carriage, and had directed it to drive him to a park. The collision occurred whilst the carriage was crossing the railway track. There was evidence that both the driver and the servants of the railway company were guilty of negligence, which partly directly caused the accident. The judge charged the jury: 'I charge you that where a person hires a public hack carriage, which at the time is in the care of the driver, for the purpose of temporary conveyance, and gives directions to the driver as to the place or places to which he desires to be conveyed, but gives no special directions as to the mode or manner of driving, he is not responsible for the acts of negligence of the driver, and if he sustains an injury by means of a collision between his carriage and another, he may recover damages from any party by whose fault or negligence the injury occurred, whether that of the driver of the carriage in which he was driving, or of the driver of the other. He may sue either. The negligence of the driver of the carriage in which he is riding will not prevent him from recovering damages against the other driver, if he was negligent at the same time.' The plaintiff recovered judgment; and the instruction was alleged as error, for which its reversal is sought." The judgment then discusses all the English cases. With regard to *Thorogood* v. *Bryan* (5), Field, J., continues: "what is meant by the passenger being 'identified with the carriage,' or 'with the person having its

(1) 5 Smith's Rep. 341.
(2) 6 Smith's Rep. 492.
(3) 31 Barbour's Rep. 385.
(4) 14 Am. Law Record, 577; 54 Am. Rep. 135.
(5) 8 C. B. 115.

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management' is not very clear. In a recent case . . . Pollock, B., said that he understood it to mean 'that the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus or his driver. . . . Assuming this to be the correct explanation, it is difficult to see upon what principle the passenger can be considered to be in the same position, with reference to the negligent act, as the driver who committed it, or as his master, the owner.' Cases cited . . . shew that the relation of master and servant does not exist between the passenger and the driver, or between the passenger and the owner. In the absence of this relation, the imputation of their negligence to the passenger, where no fault of omission or commission is chargeable to him, is against all legal rules. . . . The truth is, *the decision in Thorogood* v. *Bryan* (1) *rests upon indefensible ground. The identification of the passenger with the negligent driver or owner, without his personal co-operation or encouragement, is a gratuitous assumption. There is no such identification.*" The judge then cites several American cases to the same effect, and upholds the instruction and the verdict for the plaintiff.

After having thus laboriously inquired into the matter, and having considered the case of *Thorogood* v. *Bryan* (1), we cannot see any principle on which it can be supported, and we think that, with the exception of the weighty observation of Lord Bramwell, though that does not seem to be a final view, the preponderance of judicial and professional opinion in England is against it, and that the weight of judicial opinion in America is also against it. We are of opinion that the proposition maintained in it is essentially unjust and inconsistent with other recognised propositions of law. As to the propriety of dealing with it at this time in a Court of Appeal, it is a case which from the time of its publication has been constantly criticized. No one can have gone into or have abstained from going into an omnibus, railroad, or ship, on the faith of the decision. We therefore think that, now that the question is for the first time before an English Court of Appeal, the case of *Thorogood* v. *Bryan* (1) must be overruled. It follows that the propositions, stated at the commencement of this judgment, contain the law on this matter,

(1) 8 C. B. 115.

perhaps not exhaustively, and that the proposition contained in *Thorogood* v. *Bryan* (1) is not to be added to them. We have therefore to apply those propositions to the actions mentioned in the special case. But before doing so, we must state that, for the reasons given by Butt, J., we are in accord with him in saying that actions brought under Lord Campbell's Act are not Admiralty actions at all; that they are pure common law actions; that they are not touched by the Judicature Act, 1873, s. 25, sub-s. 9; that they are to be ruled in every respect by the common law. We desire to say that we do not express in this judgment any opinion as to whether an action brought at common law in respect to damage to cargo will, by virtue of the above section, be governed by the Admiralty practice, laid down in the case of *The Milan* (2), or whether the application of the section is to be limited to actions for injury to one of two ships, or to both, by a collision between them; or whether even in an Admiralty action by an owner of cargo the whole of the judgment in that case will ultimately be upheld.

In Armstrong's action, a point is suggested, that he ought not to recover against the defendants, the owners of the *Bernina*, because he could not recover against the owners of the *Bushire*. He would, it is rightly said, in an action against the latter, be met by the doctrine of the accident being occasioned by the negligence of a fellow-servant. The suggestion would go too far. It would apply where passengers or goods are carried by railway, or in ship, under a notice limiting the liability of that railway company or ship-owner. It would work manifest injustice by enabling a person to take advantage of a contract to which he was a stranger, and for the advantage of which he had given no consideration. The rule of law is, that a person injured by more than one wrongdoer may maintain an action for the whole damage done to him against any of them. There is no condition that he cannot do so unless he might, if he pleased, maintain an action against each of them. There is no disadvantage to the one sued, because there is no contribution between joint wrongdoers. The plaintiff Armstrong is therefore entitled to judgment for the whole of the damages he may be able to prove, according

(1) 8 C. B. 115. (2) Lush. 388.

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to the rule of damages laid down in Lord Campbell's Act. So in the case of the plaintiff Toeg. In the case of Owen, the deceased was personally negligent, so as that his negligence was partly directly a cause of the injury. He could not have recovered, neither can his administratrix. The two cases must, according to the agreement between the parties, be sent to the registrar and merchants. I have been allowed by my brother Lopes to say that this judgment is his, as well as mine; though I hope he will add some observations of his own.

LINDLEY, L.J. This was a special case. Three actions are brought in the Admiralty Division of the High Court by the respective legal personal representatives of three persons on board the *Bushire*, against the owners of the *Bernina*. Those persons were killed by a collision between the two vessels, both of which were negligently navigated. One of the three persons (Toeg) was a passenger on the *Bushire;* one (Armstrong) was an engineer of the ship, though not to blame for the collision. The third (Owen) was her second officer, and was in charge of her, and was himself to blame for the collision. The questions for decision are, whether any, and, if any, which of these actions can be maintained; and if any of them can, then whether the claims recoverable are to be awarded according to the principles which prevail at common law, or according to those which are adopted in the Court of Admiralty in cases of collision. In order to determine these questions it is first necessary to consider the statute on which the actions are founded, for it must not be forgotten that such actions as these could not be brought at common law, neither could they be maintained in the Court of Admiralty before that Court became a branch of the High Court by virtue of the Judicature Acts of 1873 and 1875. The provision of Lord Campbell's Act as to damages (9 & 10 Vict. c. 93), ss. 1, 2, was wholly inapplicable to the Court of Admiralty when the Act was passed. At that time no action for damages in the then technical sense of the expression could be brought in the Court of Admiralty. Moreover, that Court did not consist of a judge and jury, nor had it any machinery for summoning juries by whom damages could be assessed, or by whom damages could be divided

amongst persons beneficially entitled to them by the statute. Although, therefore, actions under Lord Campbell's Act can now be brought in the Admiralty Division of the High Court, it is plain that the damages must be assessed by a jury, as directed by the statute, and not by the judge, with or without other assistance, according to the rules which are usually applied in that court in cases of collision. When the Judicature Acts passed, the Court of Admiralty had no rules applicable to actions brought under Lord Campbell's Act, simply because that Court had no jurisdiction to try such cases. It follows as a consequence that, whether we regard the right to sue or whether we regard the damages to be recovered in actions founded on Lord Campbell's Act, it is impossible to comply with clause 9 of s. 25 of the Judicature Act of 1873. It is manifest that this clause in the Judicature Act has no application to such actions, although it does apply to ordinary actions for collision at sea.

Having cleared the ground thus far, it is necessary to return to the statute and see under what circumstances an action upon it can be supported. The first matter to be considered is whether there has been any such wrongful act, neglect, or default of the defendants as would, if death had not ensued, have entitled the three deceased persons respectively to have sued the defendants. Now, as regards one of them, namely, Owen, the second officer, who was himself to blame for the collision, it is clear that, if death had not ensued, he could not have maintained an action against the defendants. There was negligence on his part contributing to the collision, and no evidence to shew that, notwithstanding his negligence, the defendants could, by taking reasonable care, have avoided the collision. There was what is called such contributory negligence on his part as to render an action by him unsustainable. It follows, therefore, that his representatives can recover nothing under Lord Campbell's Act for his widow and children, and their action cannot be maintained. The other two actions are not so easily disposed of. They raise two questions: (1) Whether the passenger Toeg, if alive, could have successfully sued the defendants; and, if he could, then (2) whether there is any difference between the case of the passenger and that of the engineer

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Armstrong. The learned judge whose decision is under review felt himself bound by authority to decide both actions against the plaintiffs. The authorities which the learned judge followed are *Thorogood* v. *Bryan* (1), and *Armstrong* v. *Lancashire and Yorkshire Ry. Co.* (2); and the real question to be determined is whether they can be properly overruled or not. *Thorogood* v. *Bryan* (1) was decided in 1849, and has been generally followed at Nisi Prius ever since, when cases like it have arisen. But it is curious to see how reluctant the Courts have been to affirm its principle after argument, and how they have avoided doing so, preferring, where possible, to decide cases before them on other grounds: see, for example, *Rigby* v. *Hewitt* (3); *Greenland* v. *Chaplin* (4), *Waite* v. *North Eastern Ry. Co.* (5) I am not aware that the principle on which *Thorogood* v. *Bryan* (1) was decided has ever been approved by any Court which has had to consider it. On the other hand, that case has been criticised and said to be contrary to principle by persons of the highest eminence, not only in this country but also in Scotland and in America. And while it is true that *Thorogood* v. *Bryan* (1) has never been overruled, it is also true that it has never been affirmed by any Court which could properly overrule it, and it cannot be yet said to have become indisputably settled law. I do not think, therefore, that it is too late for a Court of Appeal to reconsider it, or to overrule it if clearly contrary to well settled legal principles.

Thorogood v. *Bryan* (1) was an action founded on Lord Campbell's Act. The facts were shortly as follows. The deceased was a passenger in an omnibus, and he had just got off out of it. He was knocked down and killed by another omnibus belonging to the defendants. There was negligence on the part of the drivers of both omnibuses, and it appears that there was also negligence on the part of the deceased himself. The jury found a verdict for the defendants, and there does not seem to have been any reason why the Court should have disallowed the verdict if not driven to do so on technical grounds. In those days, however, a misdirection by the judge to the jury compelled

(1) 8 C. B. 115.
(2) Law Rep. 10 Ex. 47.
(3) 5 Ex. 240.
(4) 5 Ex. 243.
(5) E. B. & E. 719.

the Court to grant a new trial whether any injustice had been done or not; and, accordingly, the plaintiff moved for a new trial on the ground of misdirection, and it is with reference to this point that the decision of the Court is of importance. The learned judge who tried the case told the jury in effect to find for the defendant if they thought that the deceased was killed either by reason of his own want of care or by reason of want of care on the part of the driver of the omnibus out of which he was getting. The last direction was complained of, but was upheld by the Court. The ratio decidendi was that if the death of the deceased was not occasioned by his own negligence it was occasioned by the joint negligence of both drivers, and that, if so, the negligence of the driver of the omnibus off which the deceased was getting was the negligence of the deceased; and the reason for so holding was that the deceased had voluntarily placed himself under the care of the driver. Maule, J., puts it thus: "The deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and the negligence of the driver was the negligence of the deceased." This theory of identification was quite new. No trace of it is to be found in any earlier decision, nor in any legal treatise, English or foreign, so far as I have been able to ascertain, nor has it ever been satisfactorily explained. It must be assumed, for the purpose of considering the grounds of the decision in question, that the passenger was not himself in fault. Assuming this to be so, then, if both drivers were negligent, and both caused the injury to the passenger, it is difficult to understand why both drivers or their masters should not be liable to him. The doctrine of identification laid down in *Thorogood* v. *Bryan* (1) is, to me, quite unintelligible. It is, in truth, a fictitious extension of the principles of agency, but to say that the driver of a public conveyance is the agent of the passengers is to say that which is not true in fact. Such a doctrine, if made the basis of further reasoning, leads to results which are wholly untenable, e.g., to the result that the passengers would be liable for the negligence of the person driving them, which is obviously absurd, but which, of course, the Court never meant. All the Court meant to say

(1) 8 C. B. 115.

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was that for purposes of suing for negligence the passenger was in no better position than the man driving him. But why not? The driver of a public vehicle is not selected by the passenger otherwise than by being hailed by him as one of the public, to take him up; and such selection, if selection it can be called, does not create the relation of principal and agent or master and servant between the passenger and the driver, the passenger knows nothing of the driver and has no control over him; nor is the driver in any proper sense employed by the passenger. The driver, if not his own master, is hired, paid, or employed by the owner of the vehicle he drives or by some other person who lets the vehicle to him. The orders he obeys are his employer's orders. These orders, in the case of an omnibus, are to drive from such a place to such a place and take up and put down passengers: and in the case of a cab the orders are to drive where the passenger for the time being may desire to go, within the limits expressly or impliedly set by the employer. If the passenger actively interferes with the driver by giving him orders as to what he is to do, I can understand the meaning of the expression, that the passenger identifies himself with the driver, but no such interference was suggested in *Thorogood* v. *Bryan*. (1) The principles of the law of negligence, and in particular of what is called contributory negligence, have been discussed on many occasions since that case was decided, and are much better understood now than they were thirty years ago. *Tuff* v. *Warman* (2) in the Exchequer Chamber, and *Radley* v. *London and North Western Ry. Co.* (3) in the House of Lords, shew the true grounds on which a person himself guilty of negligence is unable to maintain an action against another for an injury occasioned by the combined negligence of both. If the proximate cause of the injury is the negligence of the plaintiff as well as that of the defendant the plaintiff cannot recover anything. The reason for this is not easily discoverable. But I take it to be settled that an action at common law by A. against B. for injury directly caused to A. by the want of care of A. and B. will not lie. As Pollock, C.B., pointed out in *Greenland* v. *Chaplin* (4), the jury cannot take the

(1) 8 C. B. 115.
(2) 5 C. B. (N.S.) 573.
(3) 1 App. Cas. 754.
(4) 5 Ex. 243.

consequences and divide them in proportion according to the negligence of the one or the other party. But if the plaintiff can shew that although he has himself been negligent, the real and proximate cause of the injury sustained by him was the negligence of the defendant, the plaintiff can maintain an action, as is shewn not only by *Tuff* v. *Warman* (1) and *Radley* v. *London and North Western Ry. Co.* (2), but also by the well-known case of *Davies* v. *Mann* (3) and other cases of that class. The cases which give rise to actions for negligence are primarily reducible to three classes as follows:—

1. A. without fault of his own is injured by the negligence of B., then B. is liable to A. 2. A. by his own fault is injured by B. without fault on his part, then B. is not liable to A. 3. A. is injured by B. by the fault more or less of both combined, then the following further distinctions have to be made:—(*a.*) if, notwithstanding B.'s negligence, A. with reasonable care could have avoided the injury, he cannot sue B.: *Butterfield* v. *Forrester* (4); *Bridge* v. *Grand Junction Ry. Co.* (5); *Dowell* v. *General Steam Navigation Co.* (6); (*b.*) if, notwithstanding A.'s negligence, B. with reasonable care could have avoided injuring A., A. can sue B.: *Tuff* v. *Warman* (1); *Radley* v. *London and North Western Ry. Co.* (2); *Davies* v. *Mann* (3): (*c.*) if there has been as much want of reasonable care on A.'s part as on B.'s, or, in other words, if the proximate cause of the injury is the want of reasonable care on both sides, A., cannot sue B. In such a case A. cannot with truth say that he has been injured by B.'s negligence, he can only with truth say that he has been injured by his own carelessness and B.'s negligence, and the two combined give no cause of action at common law. This follows from the two sets of decisions already referred to. But why in such a case the damages should not be apportioned, I do not profess to understand. However, as already stated, the law on this point is settled, and not open to judicial discussion. If now another person is introduced the same principles will be found applicable. Substitute in the foregoing cases B. and C. for B., and unless C. is A.'s agent or

(1) 5 C. B. (N.S.) 573.
(2) 1 App. Cas. 754.
(3) 10 M. & W. 546.
(4) 11 East, 60.
(5) 3 M. & W. 244.
(6) 5 E. & B. 195.

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servant there will be no difference in the result except that A. will have two persons instead of one liable to him. A. may sue B. and C. in one action, and recover damages against them both; or he may sue them separately and recover the whole damage sustained against the one he sues: *Clark* v. *Chambers* (1), where all the previous authorities were carefully examined by the late L.C.J. Cockburn. This is no doubt hard on the defendant, who is alone sued, and this hardship seems to have influenced the Court in deciding *Thorogood* v. *Bryan*. (2) In that case the Court appears to have thought it hard on the defendant to make him pay all the damages due to the plaintiff, and that it was no hardship to the plaintiff to exonerate the defendant from liability, as the plaintiff had a clear remedy against the master of the omnibus in which he was a passenger. But it is difficult to see the justice of exonerating the defendant from all liability in respect of his own wrong and of throwing the whole liability on some one who was no more to blame than he. The injustice to the defendant, which the Court sought to avoid, is common to all cases in which a wrong is done by two people and one of them alone is made to pay for it. The rule which does not allow of contribution among wrongdoers is what produces hardship in these cases, but the hardship produced by that rule (if really applicable to such cases as these under discussion) does not justify the Court in exonerating one of the wrongdoers from all responsibility for his own misconduct or the misconduct of his servants. I can hardly believe that if the plaintiff in *Thorogood* v. *Bryan* (2) had sued the proprietors of both omnibuses, it would have been held that he had no right of action against one of them. Having given my reasons for my inability to concur in the doctrine laid down in *Thorogood* v. *Bryan* (2), I proceed to consider how far that doctrine is supported by other authorities. The Court, in deciding *Thorogood* v. *Bryan* (2), considered that they were following *Bridge* v. *Grand Junction Ry. Co.* (3) In that case a passenger in one train sued the owners of another train for an injury caused by a collision between the two trains. The defendants pleaded that the collision was caused in part by the negligence of the persons who had the management of the train

(1) 3 Q. B. D. 327. (2) 8 C. B. 115. (3) 3 M. & W. 244.

in which the plaintiff was. The Court held the plea bad, both in substance and in form, because the plea did not state that those who had the management of the plaintiff's train could with ordinary care have avoided the collision; and that even assuming the negligence pleaded to be proved the plea was bad on the authority of *Butterfield* v. *Forrester* (1), which was and still is a perfectly sound decision. When *Bridge* v. *Grand Junction Ry. Co.* (2) is carefully looked at, it will be found to be no authority for the doctrine laid down in *Thorogood* v. *Bryan.* (3) I cannot find in *Bridge* v. *Grand Junction Ry. Co.* (2) any authority for the proposition that the negligence of the driver of an omnibus or railway train is for any purpose to be regarded as the negligence of the passengers in it. Nor is there any case prior to *Thorogood* v. *Bryan* (3) which warrants any such proposition. *Vanderplank* v. *Miller* (4), which was relied on as an earlier authority, is very shortly reported. The plaintiff was the owner of goods on board the *Louisa,* and he sued the owners of another ship which ran into and sank the *Louisa,* for the loss of the goods. The plaintiff obtained a verdict, but Lord Tenterden told the jury that if there was fault on both sides the plaintiff could not recover, to enable him to do so the accident must be attributable entirely to the fault of the defendants. This direction cannot be properly understood without knowing more of the facts and pleadings of the case. For anything that appears to the contrary the plaintiff may have been the owner or charterer of the *Louisa,* and the employer of those on board of her: or the declaration may have been so drawn as to account for the direction that the plaintiff could not succeed unless the accident was attributable entirely to the fault of the crew of the defendant's ship. I cannot regard this case as an earlier illustration of the principle laid down in *Thorogood* v. *Bryan* (3), nor is the relation between bailor and bailee an element in the class of cases now under consideration, and to decide this case on principles applicable to bailments of goods would be to proceed on a misleading analogy. *Waite* v. *North Eastern Ry. Co.* (5) is

(1) 11 East, 60.
(2) 3 M. & W. 244.
(3) 8 C. B. 115.
(4) Moo. & M. 168.
(5) E. B. & E. 719.

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materially different from *Thorogood* v. *Bryan* (1), and was decided on a different and perfectly sound principle. The plaintiff was a child in the care of her grandmother, who had taken tickets for herself and the child to go by a train belonging to the defendant company. The plaintiff was injured in consequence of the want of care of her grandmother quite as much as by the negligence of the defendants, and it was very properly held that the defendants were not liable. There was no duty or obligation on the part of the defendants to take more care of the plaintiff than of grown-up persons, the defendants had a right to expect that proper care would be taken of the child, and if such care had been taken there would have been no accident. The plaintiff sued both in contract and in tort, but the same principle applied to both aspects of the case. In *Waite's Case* (2) Bramwell, B., said he thought that *Thorogood* v. *Bryan* (1) was rightly decided but on wrong reasoning; but the importance of the case turns entirely on the reasoning, and Bramwell, B., himself when he gave his judgment in *Waite's Case* (2) preferred to rest his decision not on *Thorogood* v. *Bryan* (1), but on the ground on which the other members of the Court decided it, as already mentioned. *Child* v. *Hearn* (3) and *Armstrong* v. *Lancashire and Yorkshire Ry. Co.* (4), are the only other cases which require notice. In the former the plaintiff was in the employment of a railway company, whose duty it was to fence its line. The defendant was the owner of some pigs which had got through the fence and upset a trolley, whereby the plaintiff was hurt. There was evidence that the defendant knew that his pigs had got through the fences on previous occasions, and his negligence consisted in not preventing them from so doing. The verdict was for the plaintiff, but the Court granted a new trial. Pigott, B., clearly was of opinion that the true cause of the injury was the negligence of the railway company and not that of the defendant. The other members of the Court, Bramwell and Pollock, BB., concurred in this view, but went further and expressed their opinion that whether the doctrine laid down in *Thorogood* v. *Bryan* (1) was right or not, yet the plaintiff being a servant of

(1) 8 C. B. 115.
(2) E. B. & E. 719.
(3) Law Rep. 9 Ex. 176.
(4) Law Rep. 10 Ex. 47.

the railway company, which had omitted to keep its fence in proper order, could not be in a better position than the company would have been in if its property had been injured by the defendant's pigs, and if the company had sued him for such injury. This view was again adopted in *Armstrong* v. *Lancashire and Yorkshire Ry. Co.* (1) In that case the plaintiff was in the employment of the London and North Western Railway Company, and was injured by a collision between a train belonging to that company and one belonging to the defendants. The collision was in the opinion of the jury caused by the negligence of the servants of both companies. The judge at the trial directed the verdict to be entered for the defendants, with leave for the plaintiff to move to enter the verdict for him. The Court held that the verdict had been rightly entered for the defendants. The Court seems to have thought that the negligence causing the collision was really that of the London and North Western Railway Company, and not of the defendants, but it did not decide the case on this ground. The Court followed *Thorogood* v. *Bryan.* (2) Bramwell, B., thought that the plaintiff could not sue his own employers, and therefore could not sue the defendants who only contributed to the mischief, and were certainly not the proximate causes of it. If the learned Baron meant that the negligence of the defendants was not part of the proximate cause of the injury to the plaintiff, it is obvious that they were not liable at all. But if the proximate cause was the combined negligence of the two companies, I confess my inability to understand upon what principle the plaintiff could be held not entitled to sue either company; or in other words, to be without a remedy. Wrongdoers are liable to be sued severally, some of them have a defence and others none. I cannot see why a servant should not sue a person who injures him, although his master or a fellow-servant also injures him at the same time, and so that his injury is the result of the conduct of both of the others. Both these cases were, therefore, rightly decided on the ground that the negligence of the defendants was not the proximate cause of the injuries sustained by the plaintiff. But the reasons for which Bram-

(1) Law Rep. 10 Ex. 47. (2) 8 C. B. 115.

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well, B., considered that the plaintiff must fail, even if *Thorogood* v. *Bryan* (1) was decided on wrong grounds, are really open to the same objections as the doctrine enunciated in that case. *Thorogood* v. *Bryan* (1) and *Armstrong* v. *Lancashire and Yorkshire Ry. Co.* (2) affirm that, although if A. is injured by the combined negligence of B. and C., A. can sue B. and C. or either of them, he cannot sue C. if he, A. is under the care of B. or in his employ. From this general doctrine I am compelled most respectfully to dissent, but if B. is A.'s agent or servant the doctrine is good. In Scotland the decision in *Thorogood* v. *Bryan* (1) was discussed and held to be unsatisfactory in the case of *Adams* v. *Glasgow and South Western Ry. Co.* (3). In America the subject was recently examined with great care by the Supreme Court of the United States in *Little* v. *Hackett* (4), in which the English and American cases were reviewed, and the doctrine laid down in *Thorogood* v. *Bryan* (1) was distinctly repudiated as contrary to sound principles. In this case the plaintiff was driving in a hackney carriage and was injured by a collision between it and a railway train on a level crossing. There was negligence on the part of the driver of the carriage and on the part of the railway company's servants, but it was held that the plaintiff was not precluded from maintaining an action against the railway company. In this country *Thorogood* v. *Bryan* (1) was distinctly disapproved by Dr. Lushington in *The Milan* (5), and even Lord Bramwell, who has gone further than any other judge in upholding the decision, has expressed disapproval of the grounds on which it was based. No text-writer has approved of it, and the comments in Smith's Leading Cases are adverse to it (vol. i., p. 266, 6th ed.). For the reasons above stated, I am of opinion that the doctrines laid down in *Thorogood* v. *Bryan* (1) and *Armstrong* v. *Lancashire and Yorkshire Ry. Co.* (2) are contrary to sound legal principles, and ought not to be regarded as law. Consequently I am of opinion that the decision in Toeg's and Armstrong's case ought to be reversed.

(1) 8 C. B. 115.
(2) Law Rep. 10 Ex. 47.
(3) 3 Court Sess. Cas. 215.
(4) 14 Am. Law Record, 577; 54 Am. Rep. 15.
(5) Lush. 388.

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LOPES, L.J. Two very important questions are raised by this case, viz.: 1. Does the Admiralty rule as to joint liability for joint negligence, apply to a case like this, brought under the provisions of Lord Campbell's Act? 2. Can the plaintiffs or either of them recover against the defendants, or, in other words, is the decision in *Thorogood* v. *Bryan* (1) good law, and ought it to be followed?

The facts of the case have been fully and accurately stated. I agree with the facts as stated by the other members of the Court. The general law of negligence has been discussed, and I agree with the law as laid down and explained. The authorities bearing upon this case have also been cited and commented upon. And if the case was not of such general importance, and if it was not proposed to overrule the law as acted upon for nearly half a century, I should think it superfluous to add my opinion to the opinions already so exhaustively and elaborately expressed. I shall, however, deal with both questions shortly.

First, is the Admiralty rule as to joint liability for joint negligence applicable to this case? According to the Admiralty rule, when both vessels are to blame, the owners and cargo-owners of each can recover half their loss from the other. This rule before the Judicature Acts clearly did not apply to claims brought by passengers or by representatives of deceased passengers under Lord Campbell's Act. Such claims were not brought in the Admiralty Court at all, because there was no question of maritime lien; but were brought in a Court of common law, in which the ordinary rule as to contributory negligence was in force. Since the Judicature Acts, the Probate, Divorce and Admiralty Division has jurisdiction concurrent with the other Divisions to try claims of this kind. Whether the Admiralty rule as to joint liability for joint negligence applies to this class of cases depends on s. 25 of the Judicature Act, 1873, sub-s. 9. It is in these words: "In any case in proceedings for damages arising out of a collision between two ships, if both ships shall have been found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of common law, shall prevail." The rule in Admiralty was only to prevail so far as it conflicted with the rule of common

(1) 8 C. B. 115.

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law. But there never was any conflict between the Admiralty and the common law rule. On the principle "actio personalis moritur cum personâ" none of these actions could be maintained before the passing of Lord Campbell's Act, and could not have been brought in the Admiralty Court before the passing of the Judicature Acts, when the Admiralty Court became a branch of the High Court. It is clear, too, from Lord Campbell's Act that that Act was never intended to apply to a court where there was no machinery for a trial by jury, and where the damages could not be assessed by a jury. I am clear, therefore, that the Admiralty rule as to joint liability for joint negligence does not apply to the present cases.

Secondly, can the plaintiffs or either of them recover against the defendants? Owen clearly cannot, because he was himself to blame; but can Toeg the passenger, and Armstrong the engineer, neither of whom were in any way to blame? If *Thorogood* v. *Bryan* (1) is to be maintained, they cannot; but if it is to be over-ruled, they can.

Thorogood v. *Bryan* (1) was an action under Lord Campbell's Act against the owner of an omnibus for a death caused by the negligence of the driver. The defendant's omnibus had knocked down and killed the deceased just as he was leaving the omnibus of another person in which he had been a passenger. The judge told the jury that if by the exercise of proper care on the part of the omnibus in which the deceased had been the injury might have been avoided, they should find for the defendant. The Court held this was a good direction in law. No weight was attached to the fact that the deceased had ceased to be a passenger on the omnibus which contributed to his death, and it seems to have been assumed that he was still to be considered a passenger. Nor was it suggested that the passenger was himself to blame. No points, however, of this kind arise in the cases now before the Court, as Toeg and Armstrong were actually on board one of the guilty ships, and Toeg and Armstrong were in no way in fault.

That a plaintiff cannot recover damages for an injury to which he has directly contributed is an established principle of law.

(1) 8 C. B. 115.

And it matters not whether that contribution consists in participation in the direct cause of the injury, or in the omission of duties, which, if performed, would have prevented it. If the fault, whether of omission or commission, has materially contributed to the injury, the plaintiff is without remedy against one also in the wrong. So much is undisputed law. The converse of this doctrine ought to follow as a necessary corollary, viz., when one has been injured by the wrongful act of another, to which he has in no way contributed, he should be entitled to compensation from the wrongdoer, unless the negligence of somebody, towards whom he stands in the relation of principal or master, has materially contributed to the injury, in which case the negligence is imputed to such principal or master, though he in no way personally participated in it, or had knowledge of it. It cannot be contended that the driver of the omnibus in *Thorogood* v. *Bryan* (1), or those in charge of the ship here, stood in the relation of principal or master to the injured persons.

The driver and those in charge of the ship were the servants of their respective employers. They selected and hired them; they controlled them; they paid them; they alone could discharge them. Neither the driver of the omnibus nor those in charge of the ship were bound to obey any order of the injured persons. The injured persons could neither direct nor alter the course or the mode of navigation of the ship, nor the destination nor mode of driving of the omnibus.

It is impossible, therefore, to contend that the relationship of master and servant existed, and that the persons injured lost their remedy, because of the contributory negligence of somebody under their control. Nor do the Court in *Thorogood* v. *Bryan* (1) rely upon any such relationship between the passenger and the driver. So far as I understand the case, they rest their judgment on the ground that the passenger trusted the driver by selecting the particular conveyance in which he was carried, and therefore so identified himself with the owner and the owner's servants, that if injury resulted from their negligence, he must be considered a party to it: in other words, to quote the language of Coltman, J., "the passenger is so far identified with the

(1) 8 C. B. 115.

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carriage in which he is travelling, that want of care on the part of the driver will be a defence of the driver of the carriage which directly caused the injury." Maule, J., said: "The passenger chose his own conveyance, and must take the consequences of any default of the driver he thought fit to trust." Cresswell, J., said: "If the driver of the omnibus the deceased was in had by his negligence or want of due care contributed to any injury from a collision, his master clearly could not maintain an action, and I must confess I see no reason why a passenger who employs the driver to carry him stands in any different position." Vaughan Williams, J., added: "I think the passenger must for this purpose be considered as identified with the person having the management of the omnibus he was conveyed in."

If the driver could be said to be the servant of the passenger, these judgments would be intelligible, and according to well-established law.

What is meant by the passenger being "identified with the carriage" or "with the person having its management" I am at a loss to understand. In *Armstrong* v. *Lancashire and Yorkshire Ry. Co.* (1) Pollock, B., said he understood it to mean "that the plaintiff, for the purposes of the action, must be taken to be in the same position as the owner of the omnibus or his driver." If that is the true explanation, then the passenger, who is blameless, is to be in the same position as the driver, who committed a wrongful act, or his master, who is responsible for the negligence of his servant. This is in accordance neither with good sense nor justice.

If, again, the passenger is to be considered in the same position as the driver or owner, and their negligence is to be imputed to him, he would be liable to third parties; for instance, in case of a collision between two omnibuses, where the driver of one was entirely in fault, every passenger in the omnibus free from blame would have an action against every passenger in the other omnibus, because every such passenger would be identified with the driver, and is responsible for his negligence. Nor, again, in the case just put, could any passenger in the other omnibus bring an action against the owner of the omnibus in which he was

(1) Law Rep. 10 Ex. 47.

carried, because the negligence of the driver is to be imputed to the passenger. If the negligence of the driver is to be attributed to the passenger for one purpose, it would be impossible to say he is not to be affected by it for others. Other cases might be put.

The more the decision in *Thorogood* v. *Bryan* (1) is examined, the more anomalous and indefensible that decision appears.

The theory of the identification of the passengers with the negligent driver or owner is, in my opinion, a fallacy and a fiction, contrary to sound law, and opposed to every principle of justice. A passenger in an omnibus, whose injury is caused by the joint negligence of that omnibus and another, may in my opinion maintain an action, either against the owner of the omnibus in which he was carried, or the other omnibus, or both. I am clearly of opinion *Thorogood* v. *Bryan* (1) should be overruled.

The plaintiffs can therefore, in my opinion, maintain their action, and the appeal must be allowed.

Appeal allowed.

Solicitors for the plaintiffs: *Lowless & Co.*

Solicitors for the defendant: *Pritchard & Sons.*

(1) 8 C. B. 115.

E. S. R.

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Jan. 11.

IN THE GOODS OF —— THOMPSON.

Administration, Application for—Declaration—Chain of Representation—Grant of Administration of the Goods of a Person as to the Date of whose Birth or Death no positive Evidence was forthcoming.

Upon an application for administration to the estate of a child, the Court allowed the birth and death of the child to be proved by evidence of declarations by its deceased mother.

THIS was an application for a grant of administration to the personal estate and effects of a deceased person, as to the date of whose birth and death and as to whose name there was no positive evidence forthcoming.

By the articles of settlement in contemplation of a marriage between Marmaduke Thompson and Eliza Maria Cowling, afterwards Thompson, dated April 30, 1806, and by an indenture of lease and release dated October 15 and 16, 1806, between the same parties, the eighth share of certain hereditaments and premises (for which, and in pursuance of a power contained in the settlement, a capital sum of 1000*l.* was afterwards substituted), was settled on trust to be divided after the death of the survivor of them between all the children of the marriage.

Marmaduke Thompson died May 1, 1846, and Eliza Maria Thompson died December 3, 1849, leaving an only child surviving, Eliza Henrietta, the wife of J. D. Taylor. Mrs. Taylor died in 1876, and Mr. Taylor in 1886. In 1854 the trustees of the settlement had paid a sum of money, representing the fund, into the Court of Chancery, and in 1886 a suit was instituted in the Chancery Division for the administration of the trusts of the settlement.

In the course of the inquiry before the chief clerk there appeared reason to believe that a son had been born of the marriage of Mr. and Mrs. Thompson, who, however, died before the birth of Mrs. Taylor, which was in April, 1811.

The chief clerk required that administration should be taken out to the estate of this child, and application was accordingly made by the executors of Mr. Taylor, who had also obtained letters of administration of the estate of Mrs. Taylor, and a grant

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de bonis non to Marmaduke Thompson. The only evidence of the existence of this child was contained in the affidavits made by Harriet Mitcham, an old nurse, and Mrs. Aston, an old friend of the family, who stated that Mrs. Thompson had frequently told them that she had a boy who was born before her daughter, and died at the age of twelve months, before the daughter was born. But neither of them could recollect the name of the child, or in what year it was born or died. There were also affidavits that search had been made in the registers of all the neighbouring churches, without any trace of the baptism or burial of the child being discovered, and that advertisements had been published offering rewards for any such certificates, but without effect. It was also stated that in the event of the grant being made the fund would be divisible among the same persons, if not through the same channel.

Bayford, Q.C, for the applicants.

THE PRESIDENT. I see no real difficulty in making the grant. We have the declarations of the mother, and there is no reason to doubt the accuracy of the account given of them in the affidavits which have been read. I therefore allow the grant to go. We have the surname of the child, and the Christian name, of course, will be in blank; and to prevent any mischief at any future time, if we are making a mistake now, the grant will be defined as to the estate of a person who was born after the date of the marriage, and who died before the date of the birth of the daughter.

Solicitors: *Lindo & Co.*

W. L.

1887
Jan. 18;
Feb. 3.

SMITH *v.* SMITH AND GRAVES.

Divorce—Variation of Settlements—Division of Trust Fund.

By a post-nuptial settlement a husband assigned certain property to trustees on trusts to pay him the income during his life, or until he had incurred a forfeiture, and on a determination of his interest, to his wife for her life, with further discretionary trusts for the benefit of the husband's next of kin, or for the benefit of a second wife, or the issue of a second marriage.

The husband became bankrupt, and by a compromise sanctioned by the Chancery Division a portion of the fund was assigned to his trustee in bankruptcy, and his interest in the remainder was assigned to the trustees of the settlement.

Subsequently the marriage was dissolved on account of the wife's adultery, and on a petition for variation of settlements the registrar proposed that the trusts of the settlement should be extinguished, and that seven-twelfths of the fund should be paid to the husband, and five-twelfths to the wife.

Both parties agreed to this, but the trustees of the settlement objected, and the Court refused to sanction a division of the fund, but ordered that the income of five-twelfths of it should be paid to the wife, and that in all other respects the trusts of the settlement should remain in force.

THIS was an application to confirm the report of the registrar on a petition for the variation of settlements. The petition was by the husband against the wife, and a decree absolute dissolving the marriage on the ground of her adultery was pronounced on June 22, 1886. There was no child of the marriage.

By a post-nuptial settlement bearing date June 9, 1877, and made between the petitioner, the respondent, and certain trustees, the petitioner assigned certain property to the trustees upon trust to pay the income thereof to the petitioner until he should incur a forfeiture as therein mentioned, and after the determination of his interest to pay the income to the respondent during her life, and subject thereto, in case there should be no child of the said marriage, to pay the said income, or any part thereof, at the discretion of the trustees for or towards the maintenance and personal support of the petitioner and any future wife of his, and his child or children by her, or for or towards the maintenance and personal support of any one or more of the objects of the discretionary trust, and upon further trust to accumulate the residue of the income during the remainder of the life of the petitioner, and after his death to stand possessed of the

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trust funds upon trust for such person or persons as under the Statutes of Distribution would have become entitled thereto, in case the said petitioner had died possessed thereof and intestate.

The petitioner had incurred a forfeiture of his interest, having become bankrupt in the year 1880, when in an action in the Chancery Division a compromise was sanctioned, by which the trustees of the settlement paid to the trustees in bankruptcy two sums of 565*l.* and 280*l.*, and the trustees in bankruptcy assigned the bankrupt's interest in the remainder to the trustees of the settlement.

The property now remaining subject to the trusts of the settlement consisted of 200*l.* East and West India Dock Stock, 665*l.* Great Western Railway Preference Stock, 1000*l.* London and South Western Railway Preference Stock, and the registrar reported that the trusts of the settlement should be extinguished, and that five-twelfths of the capital sum should be paid to the respondent, and seven-twelfths to the petitioner.

B. Deane, for the petitioner, moved to confirm the registrar's report.

Fitzgerald, for the respondent, assented.

Chapman, for the trustees, opposed. The husband and wife are not entitled to divide the corpus, as there are trusts in favour of the next of kin, and the settlement also contemplates the possibility of a second marriage of the petitioner, which, for all they know, may have happened. If so, the second wife and her children might have interests under the settlement which should not be extinguished. He cited *Paul* v. *Paul*. (1)

Cur adv. vult.

THE PRESIDENT. This was an application to confirm the report of the registrar on a motion for variation of settlement. The petition was by the husband against his wife for the dissolution of the marriage, and a decree absolute has been pronounced. It now appears that a post-nuptial settlement was made between the petitioner and the respondent and certain trustees, by which a certain sum of money was to be paid into settlement by the husband, with a reservation to him for life, and provision was

(1) 20 Ch. D. 742.

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made as to the application of the income of the fund, in the event of his doing anything by which his interest would be forfeited, and the trustees were to apply the income for the benefit of the petitioner and his family. There were certain ultimate trusts for the benefit of next of kin of the petitioner, and also for the benefit of the children of any second marriage. There have been proceedings in bankruptcy, and the Chancery Division, it appears, has sanctioned a compromise by which the trustees in bankruptcy and the trustees of the settlement were authorized to make a division of the property. Now the question comes before me to consider whether a further division of that property which remains in the hands of the trustees may be made. The husband and wife have come to an arrangement, by which it is proposed that the trusts should be extinguished, and that five-twelfths of the property should be paid to the respondent, and seven-twelfths to the petitioner. The trustees objected to this, and I am of opinion that they have established good ground of objection to this mode of disposing of the fund. In the first place it is to be observed that this settlement was irrevocable. It could not be put an end to by the petitioner and his wife, while they were man and wife, and I see no reason why I should interfere any more with the terms of the settlement than appears to me to be necessary to do justice in the case. The effect of the arrangement which the petitioner is willing to make would be that the respondent would have absolute control over five-twelfths of the property, in consideration of his having the power to spend the remainder. The justice of the case would be met by allowing the respondent the income of the five-twelfths, and keeping the trusts in full force. The order I shall make will be, therefore, that the trustees do pay to the wife, during her life, the income of five-twelfths of the settled property, and in all other respects the settlement to remain in force.

Solicitors for petitioner: *Bolton, Robbins, & Busk.*
Solicitors for respondent: *Knight & Raven.*
Solicitors for trustees: *Freeman & Bothamley.*

W. L.

THE VICTORIA.

1887
Jan. 25.

Admiralty—Jurisdiction—Collision—Damage to Cargo—24 Vict. c. 10, s. 7.

Under 24 Vict. c. 10, s. 7, the Admiralty Division has no jurisdiction to entertain an action in rem by the owners of cargo against the vessel on which it was laden for damage done to such cargo.

MOTION to dismiss an action, and to set aside a writ and a warrant of arrest.

The plaintiffs were the owners of cargo laden on the *Victoria*. This cargo had been injured by a collision between the *Victoria* and the *Cervin*, for which the *Victoria* was pronounced solely to blame, in an action between her owners and those of the *Cervin*. The *Victoria* was bound from the East Indies to Havre, calling at Malta for orders. The collision took place before reaching Malta: all her cargo was discharged at Havre. The plaintiffs commenced an action in rem against the *Victoria* for damage to cargo, and she was arrested in the action.

Finlay, Q.C., and *Stubbs*, for the defendants. There is no jurisdiction in the Court to entertain this action. 24 Vict. c. 10, s. 7 (1), applies only to damage done by a vessel to something with which it can come in contact, and not to cargo on board. Actions for damage to cargo are governed by s. 6.

Barnes, for the plaintiffs. The damage in question was done by a ship within the meaning of s. 6. The collision was the cause of the damage, and so the damage was done by the ship. [He referred to *The Energy* (2); *The Pieve Superiore* (3); *Martin* v. *Great Indian Peninsular Ry. Co.* (4); *The Sisters*. (5)] Sect. 6 must be construed in its widest sense: *The Malvina*. (6)

BUTT, J. I am clearly of opinion that this is an attempt to extend the jurisdiction in rem of this Court, which is neither

(1) 24 Vict. c. 10, s. 7: "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship."

(2) Law Rep. 3 Ad. & E. 48.
(3) Law Rep. 5 P. C. 482.
(4) Law Rep. 3 Ex. 9.
(5) 1 P. D. 117.
(6) Br. & L. 57.

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THE VICTORIA.

warranted by the words of 24 Vict. c. 10, s. 7, nor by the intention with which that section was framed. The damage the subject of this action is not "damage" within the meaning of s. 7. I therefore dismiss the action, and set aside the writ and the warrant of arrest with costs.

Solicitors for the plaintiffs: *Waltons, Bubb, & Waltons.*
Solicitors for the defendants: *Stokes, Saunders, & Stokes.*

E. S. R.

Feb. 8.

THE J. H. HENKES.

Practice—Discontinuance—Rules of Supreme Court, 1883, *Order XXVI., r.* 1—*Compulsory Pilotage—Costs.*

In an action of damage by collision, the defendants pleaded, inter alia, that their vessel at the time of collision was compulsorily in charge of a licensed pilot, and that the negligence, if any, which caused the collision was solely that of the pilot:—

Held, that on the plaintiffs' discontinuing their action, they must pay the defendants' costs.

APPEAL summons heard before Butt, J., in Chambers.

Aspinall, for the plaintiffs.
Barnes, for the defendants.
The facts appear in the judgment of Butt, J.

Cur. adv. vult.

Feb. 8. Judgment was delivered in Court.

BUTT, J. This was an action of damage, and on the defendants pleading (1) no negligence of the owner, master, or crew; (2) compulsory pilotage and the default of the pilot alone, the plaintiffs applied in the registry to discontinue their action. But the registrar would only allow them to do so on their paying all the costs of the action. I have now to decide the question raised by the summons on behalf of the plaintiffs to review the registrar's decision as to costs. The Admiralty Court is now merged in a Division of the High Court, it is therefore desirable that, so far as possible, the practice in this Division should be the same as in the other Divisions. Although there is no doubt that

damage was done to the plaintiffs' ship, though it may have been reasonable to bring the action, and though the defence of compulsory pilotage may have taken the plaintiffs by surprise, yet the ordinary rule is that when a party loses, he must pay the costs. No doubt when the defendants, after an action has been tried, have succeeded on the ground of compulsory pilotage, the Court, in the exercise of its discretion, has been in the habit of making each side pay their own costs. But this judicial discretion can only be properly exercised after the facts of the case have been ascertained at the trial of the action. If, however, a plaintiff elects to discontinue his action before trial, there are no materials by which the judge's discretion can be guided. Therefore as the plaintiffs have brought an action, and have failed to carry it to a hearing, the ordinary rule must be applied, and they must pay the defendants' costs.

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THE J. H. HENKES.

Solicitors for plaintiffs: *Wynne, Holme & Wynne,* for *H. Forshaw & Hawkins,* Liverpool.

Solicitors for defendants: *Pritchard & Sons,* for *Genn & Nalder,* Falmouth.

E. S. R.

IN THE GOODS OF BENJAMIN HUGHES.

Jan. 25; *Feb.* 23.

Will—Codicil executed on Margin of Will—Foot or End—Wills Act (1 *Vict. c.* 26) *s.* 9—*Lord St Leonards' Act* (15 *Vict. c.* 24), *s.* 1.

A testator duly executed a will prepared by a solicitor which was written on the first side of a sheet of foolscap paper. Desiring shortly before his death to make an alteration in the disposition of his property he called in the assistance of a neighbour, who wrote out a codicil on the third sheet of the foolscap, beginning, "The following alterations having been first made," and ending with an attestation clause in due form. The mark of the testator, however, and the signatures of the attesting witnesses, were written opposite the body of the will on the margin of the first page, the person who prepared the codicil being under the impression that as it was an alteration in the will it ought to be attested on the margin:—

Held, that the codicil was not duly executed, and probate refused.

BENJAMIN HUGHES, late of Bistree, in the county of Flint, collier, duly executed a will bearing date May 22, 1878, by which he gave his house and garden to his wife for life, and after her death to his son Walter, and the rest of his estate he directed after his death to be distributed among his children

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IN THE GOODS OF HUGHES.

equally. The will was drawn by a solicitor on the first page of a sheet of foolscap paper, and executed by the testator, making his mark, he being unable to write.

On October 23, 1886, desiring to make an alteration in his will, by which his house and garden, bequeathed to his son Walter, should be sold and equally divided among all his children, he called in the assistance of a neighbour, John Jones, who drew up the following paper on the third side of the sheet of foolscap on which the will was written:—

"The following alterations having been first made:—

> "That the house and garden bequeathed to my younger son, Walter Hughes, situate at Bistree, in the county of Flint, be sold, and all my personal estate afterwards, and after the death of my wife Prudence Hughes, or widowhood, be equally divided between the sons and daughters then living, or the offspring (if any) of those that may be deceased.

"Signed by the sd / testator (on the margin) of the aforesaid written and testament, in the presence of us, who at his request in the presence of each other have hereunto subscribed our names as witnesses.

> "The twenty-third day of October eighteen hundred and eighty-six."

The mark of the deceased, and the names of the two attesting witnesses, were written on the margin of the will on the first side of the sheet of foolscap; and John Jones, who prepared the codicil, made an affidavit that, having perused the "Instructions how to make a will," in a penny almanac, he had gathered from them the impression that all alterations made in a will must be attested on the margin thereof, and, regarding the codicil as alterations of the will, he had caused the testator and the witnesses to sign there.

Middleton moved for probate of the will and codicil, and referred to *In the Goods of Birt* (1), where words written on the

(1) 2 P. & M. 214.

second sheet of a will, the signature and attestation being at the bottom of the first sheet, were treated as an interlineation.

Cur. adv. vult.

THE PRESIDENT. In this case the will of the testator, Benjamin Hughes, a marksman, was made on the first side of a sheet of foolscap, and a document which is described as an alteration in the will, but which is written on the third side of a sheet of foolscap, is not executed by the deceased upon that side. There is an attestation clause at the end of this document to this effect: "Signed by the testator on the margin of the afore-written will, in the presence of us, who at his request, &c." Accordingly, in the margin of the will in the first sheet is the execution of the testator and the attesting witnesses. The question arises whether that was a good execution of the codicil, or whatever it may be called, on the third sheet. The case stood over, not because I entertained any doubt on the point; but I have so recently expressed my views upon this subject, and upon the execution of testamentary papers, that it is not necessary for me to go again into the details of the principles which ought to govern the decision of cases of this kind. It is sufficient to say that the legislature has never departed from this standard: that the execution of a testamentary paper must be signed at the foot or end thereof. All it has done has been to extend these words in some particulars. But it appears to me to be impossible to say that this execution on the first page is an execution at the foot or end of the document which is on the third page. It is an illustration of the saying about the danger of "a little knowledge." The parties seem to have thought that, because alterations are directed to be indicated in the margin of a will, that the codicil, which effects an alteration in the meaning of the will, may be treated as an alteration in the will itself, and is to be executed in the margin of the will. That is an entirely mistaken view, and I am compelled, therefore, to hold that this codicil cannot stand, and I refuse probate of it.

Solicitors: *Indermaur & Brown.*

W. L.

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Feb. 8.

WARD *v.* HUCKLE.

Probate—Widow interested in Intestacy a Lunatic—Citation to see Proceedings—Heir-at-law represented—Practice.

In a probate suit the persons interested in establishing an intestacy were the widow of the testator and his brother the heir-at-law. The widow was a lunatic, confined in an asylum in Australia, and as the heir-at-law had already appeared as a party in the suit the Court refused to order the widow to be cited to see proceedings.

Frederick Thomas Huckle, late of Moss Grange, Upper Sydenham, in the county of Surrey, died July 23, 1886, leaving a will duly executed, bearing date April 15, 1886, and three codicils purporting to be dated June 29, 1886, July 1, 1886, and July 15, 1886.

By his will he devised all his real and personal estate to trustees to pay the annual income thereof "to his wife, Elizabeth Huckle, formerly Elizabeth Headly, spinster," for her life, and, after her death to pay the income to his four sons by the said Elizabeth Huckle, in equal shares, with power of appointment, and he nominated Elizabeth Huckle, Porter Headley, her brother, and Sydney John Huckle, his nephew, to be trustees and executors. The two codicils made no alterations in the main provisions of the will for the benefit of Elizabeth Huckle, but increased the amount of several small legacies, and the third codicil revoked the appointment of Mr. Porter Headley as executor, and nominated in his place Mr. Luther Martin Ward.

The last-named executor propounded the will and three codicils, and Elizabeth Huckle and Porter Headley instituted a cross suit, to which Sydney J. Huckle, Luther Martin Ward, and John Huckle, the brother and heir-at-law of the deceased, appeared as defendants, in which they propounded the will, and pleaded that the three codicils were not duly executed, and that the testator was not of sound mind when he was alleged to have executed them.

By an order of the Court the two suits had been consolidated. It appeared that Elizabeth Huckle was not the lawful wife of the testator. Some years before he had gone through the form of marriage with her he had married in Australia, and his wife, Ann Huckle, was still alive, but was a confirmed lunatic, and

confined in a lunatic asylum in Australia. Neither in the will nor in any one of the codicils was any provision made for her.

The estate of the deceased consisted of personalty and of realty, amounting to about 600*l.* a year.

Gregson, on behalf of the plaintiff Ward, moved for leave to cite the widow, Ann Huckle, in order that she might be bound by the result of the proceedings, and also to cite John Huckle, the heir-at-law, and Porter Headley, the executor under the will, as all three were interested in the realty.

Searle, for the defendants, opposed the application to cite the widow. The only result of granting it must be delay, and it is not probable that any one will undertake the duty of representing a person confined in a lunatic asylum at such a distance. The will is not disputed, and the defendant, Elizabeth Huckle, who practically is the sole person, with her children, interested in it, is quite willing to take any risk which may occur from the widow not being cited. But if there were a possibility of upsetting the will, the widow's interest in an intestacy will be amply looked after by the heir-at-law, who is a party to the suit.

THE PRESIDENT. There can be no objection to the other two persons being cited, but with regard to the widow I do not see the necessity. It seems to me idle to allow this woman to be cited, she being a confirmed lunatic out in Australia. If she had any friend here, so that I might feel sure that her rights would be looked after, it would be a different matter. But in the absence of any information of that kind I do not feel disposed to allow her to be cited. I am the more confirmed in that view because I see that the person who has the strongest possible motive in upsetting the will—the heir-at-law—is a party to the suit, and, therefore, as far as I can see, he will fight the battle of this absent person. He is heir-at-law to 600*l.* a year, and if he does not think it worth his while to test the validity of a will which deprives him of that, it is evident that the risk the executors will run from the widow not being cited will be of a very infinitesimal character.

Solicitor for plaintiff: *H. C. Page.*

Solicitors for defendant: *Scott & Spalding.*

W. L.

1887
Feb. 22.

HETHERINGTON *v.* HETHERINGTON.

Justices—Conviction of Husband for Assault on Wife—Separation Order—Application to discharge—Appeal—Evidence of Wife's Adultery—Matrimonial Causes Act, 1878 (41 *&* 42 *Vict. c.* 19), *s.* 4.

Where an order has been made under the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), s. 4, for the payment of money by the husband or custody of children by the wife, an application to discharge the order on the ground that the wife has been guilty of adultery must be made to the Court or magistrates by whom the order was made, and not to the Probate and Admiralty Division.

An order under s. 4 of the Act, or a refusal by the justices to vary such order, is subject to appeal to the Probate and Admiralty Division, although the justices have stated a case for the opinion of the Queen's Bench Division, which has not been determined.

Where an order has been made under s. 4 authorizing a wife to refuse to cohabit with her husband, the presumption of non-access applies from the date of the order as in the case of a judicial separation; and the justices on an application to vary the order on account of the wife's adultery cannot refuse to receive the direct evidence of the husband or the admissions of the wife in proof of the paternity of a child born more than nine months after the separation.

This was an application under s. 4 of the 41 & 42 Vict. c. 19 (1) to discharge an order made on January 1, 1883, under the provisions of the same Act by the justices of the Chester Ward Division of the county of Durham, whereby it was ordered that William George Hetherington having been convicted of an aggravated assault on his wife Elizabeth Hetherington, she should no longer be bound to cohabit with him, that the husband should pay her ten shillings weekly, and further that the wife should have the custody of the children of the marriage.

The ground of the application was that since the date of the order the wife had been guilty of adultery, and had given birth

(1) The following is the proviso to s. 4: "Provided always, that no order for the payment of money by the husband, or for the custody of children by the wife, shall be made in favour of a wife who shall be proved to have committed adultery, unless such adultery shall have been condoned, and that any order for the payment of money, or for the custody of children may be discharged by the Court or magistrate by whom such order was made, upon proof that the wife since the making thereof has been guilty of adultery; and provided also that all orders made under this section shall be subject to appeal to the Probate and Admiralty Division of the High Court of Justice."

to a child, born more than nine months after the separation, of which the husband was not the father. The evidence relied on to prove this was the admission of the wife in cross-examination on a proceeding in the police court against the husband on September 16, 1886, to enforce the payment of arrears of her allowance.

Shortly after this admission the husband took out a summons to vary the order, which was heard before the justices at the Consett police court on October 9 and 16, 1886. The justices refused to hear the husband's evidence of non-access, and they also refused to compel the wife to give evidence of the parentage of the child, or to receive evidence of her admissions that her husband was not the father, on the ground that such evidence was inadmissible against her as varying the status of a child born in wedlock. The justices at the hearing expressed an opinion that the appeal from their decision was to the Queen's Bench Division, and stated a special case; and the husband also appealed concurrently to this Division against their refusal to vary the original order. His appeal was heard on January 25, 1887, when the President ordered it to stand over while the special case was pending in the Queen's Bench Division.

The appeal and the special case were both subsequently withdrawn, and the present application was to discharge the original order of 1883. Since the making of this one of the magistrates had died.

R. H. Pritchard, for the applicant. The magistrates were clearly bound to receive evidence of the wife's adultery, and of the birth of a child, not being the husband's, because the issue was not whether the child was legitimate, but whether the wife had committed adultery since the making of the order. The Court mentioned in the Act is clearly this Court, as is shewn by the 2nd and 3rd sections, which can have no possible reference to magistrates. He referred to 1 Salkeld, 123; Taylor on Evidence, 8th ed., p. 817; Roscoe's N. P. p. 954; and *Ex parte Sharpe*. (1)

Back, for the wife. The Court mentioned in the 4th section

(1) 33 L. J. Mag. Cases, 152.

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of the Act is not this Court, but the magistrates who made the order, and the application should be made to them. As to the wife's admissions, the evidence obtained from her was in an entirely different proceeding, and she could not have been cross-examined as to her own adultery: *Babbage* v. *Babbage and Manning.* (1)

THE PRESIDENT. I regret that this litigation has reached its present pitch, and I hope the opinion I am about to express as to whether or not there was evidence on which the magistrates might have acted for the purpose of discharging the original order, may have some effect in bringing it to an end. There is no doubt that from the time such an order is made—which is equivalent to a judicial separation and the ancient divorce à mensâ et thoro—the parties are authorized to live apart, and from that moment all the presumption which exists in the case of married persons as to access and the legitimacy of children is reversed. If a child is born more than nine months after the separation, it is presumed to be illegitimate, unless it be shewn as a matter of evidence that the husband and wife have come together again. That has been long settled by the case referred to in Salkeld, and if it had been taken into consideration by the magistrates when the matter was before them the result might have been different. Unfortunately in refusing to act on the evidence of the parties, they seem to have been under the impression that the issue was one of bastardy, which it was not, but one of adultery. When the matter came before me by way of appeal under the 4th section of the 41 & 42 Vict. c. 19, I entertained no doubt—and I continue of the same opinion—that I had jurisdiction by way of appeal from the magistrate's refusal to make an order, which refusal was in fact in itself an order. But as a matter of discretion I did not think it right to exercise that right of rehearing, while there was a special case pending in the Queen's Bench. But now the case comes before me in a new form—in the form of a substantive application to discharge the order made in 1883, upon the ground that under the 4th section of the Act I have power to discharge the original order upon the fresh evidence before me. I have

(1) Law Rep. 2 P. & M. 222.

listened to the arguments addressed to me by Mr. Pritchard, and I have come to the conclusion that I have not the power.

Undoubtedly the words "the Court" are used in some sections of this Act plainly as applying to the Divorce Court (now this Division of the High Court). It is sufficiently obvious in regard to the 2nd section, where the Queen's Proctor is mentioned, and in the 3rd section, which extends the power as to settlements possessed by this Court under the 22 & 23 Vict. c. 61, s. 5. But then we come to a totally different enactment in which, though the word "Court" may occur, it by no means follows that it is used in the same sense.

Sect. 4 provides that if a husband is convicted of an aggravated assault on his wife, "the Court or magistrate before whom he is convicted" may make an order equivalent to a judicial separation. I am of opinion that these words must be read distributively. In the 1st sub-section of the section it is provided that "the husband shall pay to his wife such weekly sum as the Court or magistrate may consider within his means." It is inconceivable that the legislature can have meant this sub-section to refer to this Court. It refers entirely to a matter to be dealt with by a magistrate, and it would be a most unnatural thing to suppose that when a magistrate had been satisfied that the husband had been guilty of an aggravated assault, this Court should fix the weekly sum which he was to pay. I think the whole collocation of the governing section and the sub-section shews that the legislature had the idea of the man being convicted and dealt with entirely by the same Court; it may have been a quarter session court, or an assize court, or a magistrate's court. The only natural interpretation is that "the Court" does not mean this Court, but the Court before whom the man was convicted. Further light is thrown on it by the language of the proviso: "No order for the payment of money by the husband, or for the custody of the children by the wife, shall be made in favour of a wife who has been guilty of adultery, and any order for the payment of money may be discharged by the Court or magistrate by whom it was made." I think that is all governed by the words "by whom." The last concluding words of the proviso tend to confirm and strengthen that view: "Provided also that all orders made under

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this section shall be subject to appeal to the Probate and Admiralty Division of the High Court of Justice." The result is, that I do not think I have power to discharge this order. That can only be done by the Court which made it. When an application has been made to that Court, if it makes an improper order or refuses to make any order, there will be an appeal to this Court, but the present application must be dismissed.

Solicitors for applicant: *Pritchard & Sons, for T. W. Welford, Consett.*

Solicitor for respondent: *T. Cray, for Dix & Wharton.*

W. L.

March 7.

[BEFORE THE DIVISIONAL COURT,
LORD COLERIDGE, C.J., and BUTT, J.]

MURFETT *v.* SMITH.

Probate — Practice — New Trial — Misdirection — Insufficient Statement of Grounds in Notice—Order XXXIX., r. 3—Testamentary Incapacity.

Order XXXIX., r. 3, which requires that the grounds on which misdirection is alleged should be stated in the notice of motion for a new trial, applies to motions in the Probate Division as well as to the Queen's Bench Division.

Pfeiffer v. *Midland Ry. Co.* (18 Q. B. D. 243) followed.

On the question of testamentary incapacity *Banks* v. *Goodfellow* (Law Rep. 5 Q. B. 549) followed.

THIS was a motion for a new trial of a probate suit tried before the President and a common jury on January 12, 1887.

The plaintiff propounded the will of Sarah Ives, deceased, which was opposed by the defendant on the grounds of undue execution and testamentary incapacity. The jury found the issues in favour of the plaintiff, and the President pronounced for the will with costs.

The notice of motion for a new trial was in the following terms:

"Take notice that the above-named defendant will at the expiration of eight days after service of this notice move a Divisional Court of this division that the finding of the jury upon the trial of this action and the judgment directed to be entered in this action on January 12, 1887, may be set aside and a new trial

had between the parties on the ground that the judge misdirected the jury and that the verdict was against the weight of evidence."

Bayford, Q.C. (*B. Deane*, with him), submitted that the notice was bad, inasmuch as it did not set forth the grounds of misdirection. He cited Order XXXIX., rule 3, and *Pfeiffer* v. *Midland Ry. Co.* (1)

Middleton, for the defendants, asked for an adjournment in order to amend the notice, but the Court refused it; and he then addressed the Court on the other ground, that the verdict was against the weight of evidence.

LORD COLERIDGE, C.J. The application for a new trial is made on two grounds: misdirection, and that the verdict was against the weight of evidence. With regard to the first the notice of motion only alleges misdirection generally, and does not state any specific ground. In *Pfeiffer* v. *Midland Ry. Co.* (1) a Divisional Court held that this notice was not sufficient, and I am of opinion that the objection taken by Mr. Bayford, on the authority of this case, is fatal, not only from the words of Order XXXIX., r. 3, but by the analogy to the practice which existed before the rule was made. The procedure was then by rule nisi, and if a rule nisi was obtained it was necessary, in order to give notice to the opponents, to state in the rule the points upon which it was alleged that the judge had misdirected the jury. That was an invariable rule. But now that the rule nisi has disappeared under the Judicature Acts, Order XXXIX., r. 3, prescribes that every application for a new trial shall be by notice of motion, and the rule goes on to say that the notice shall state the grounds of the application—whether all or part of the verdict or finding is objected to; on the principle that a person who comes here to maintain a verdict or direction which he has got in his favour shall understand on what grounds it is impugned. It is clear on the authority of the case cited that the form of notice given in this case will not do in the Probate Division any more than in the Queen's Bench Division. An application was made for leave to amend the notice, but we did not think there was any ground for acceding to the application.

(1) 18 Q. B. D. 243.

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BUTT, J., concurred.

On the other ground, that the verdict was against the weight of evidence, THE COURT was of opinion, on the authority of *Banks* v. *Goodfellow* (1), that as the delusions to which the deceased was subject did not enter into the making of the will, the jury had good grounds for finding that the deceased was of sound mind at the time the will was made.

Motion refused with costs.

Solicitors for plaintiff: *Paterson & Co.*
Solicitors for defendant: *Bridges, Sawtell, & Co.*

W. L.

1886
Dec. 14.
1887
Feb. 7;
March 28.

THE ARINA.

Wages—Master—17 & 18 *Vict. c.* 104, *ss.* 187, 191—*Right to Ten Days' Double Pay—Merchant Seamen (Payment of Wages) Act*, 1880 (43 & 44 *Vict. c.* 16), *s.* 4—*Right to Wages to Final Settlement of Claim.*

A master is not entitled under ss. 187 and 191 of the Merchant Shipping Act, 1854, to the double pay for delay in the payment of wages recoverable by "seamen" under the former section.

The Princess Helena (Lush. 190) overruled.

A master is not entitled under the Merchant Seamen (Payment of Wages Act), 1880, s. 4, to wages up to the final settlement of his claim.

MOTION by the plaintiff and cross-motion by the defendant in objection to the registrar's report.

The plaintiff was the late master of the barquentine *Arina*, and had commenced an action in rem for wages and disbursements, which was defended by one Stewart, the mortgagee in possession of the *Arina*, who had intervened in the action. The action was referred to the registrar and merchants, but before the reference came on for hearing the amount claimed by the plaintiff was paid into Court. The only points for the decision of the registrar were therefore whether the plaintiff was entitled to ten days' double pay, and wages to the date of settlement of the claim, and to costs. The double pay was claimed under 17 & 18 Vict.

(1) Law Rep. 5 Q. B. 549.

c. 104, ss. 187, 191 (1), the wages to the date of settlement under 43 & 44 Vict. c. 16, s. 4, sub-s. 4. (2) The sub-registrar held that the plaintiff was entitled to ten days' double pay, that he was not entitled to wages to the date of settlement, and that he was entitled to the costs of the reference, but not to the other costs of

(1) 17 & 18 Vict. c. 104, s. 187: "The master or owner of every ship shall pay to every seaman his wages within the respective periods following, (that is to say); in the case of a home-trade ship within two days after the termination of the agreement, or at the time when such seaman is discharged, whichever first happens; and in the case of all other ships (except ships employed in the Southern Whale Fishery, or on other voyages for which seamen by the terms of the agreement are wholly compensated by shares in the profits of the adventure) within three days after the cargo has been delivered, or within five days after the seaman's discharge, whichever first happens; and in all cases the seaman shall at the time of his discharge be entitled to be paid on account a sum equal to one-fourth part of the balance due to him; and every master or owner who neglects or refuses to make payment in manner aforesaid without sufficient cause shall pay to the seaman a sum not exceeding the amount of two days pay for each of the days, not exceeding ten days, during which payment is delayed beyond the respective periods aforesaid, and such sum shall be recoverable as wages."

Sect. 191: "Every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages which by this Act, or by any law or custom, any seaman, not being a master, has for the recovery of his wages; and if in any proceeding in any Court of Admiralty or Vice-Admiralty touching the claim of a master to wages, any right of set-off or counter-claim is set up, it shall be lawful for such Court to enter into and adjudicate upon all questions, and to settle all accounts then outstanding and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due."

(2) 43 & 44 Vict. c. 16, s. 4: "In the case of foreign-going ships—

"(1) The owner or master of the ship shall pay to each seaman on account, at the time when he lawfully leaves the ship at the end of his engagement, two pounds, or one-fourth of the balance due to him, whichever is least; and shall pay him the remainder of his wages within two clear days (exclusive of any Sunday, fast-day in Scotland, or Bank holiday) after he so leaves the ship."

"(4.) In the event of the seaman's wages or any part thereof not being paid or settled as in this section mentioned, then, unless the delay is due to the act or default of of the seaman, or to any reasonable dispute as to liability, or to any other cause not being the act or default of the owner or master, the seaman's wages shall continue to run and be payable until the time of the final settlement thereof."

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the action. The plaintiff objected to the decision of the registrar as to the non-allowance of wages to the date of settlement of the claim, and the defendant in regard to the allowance of ten days' double pay.

It appeared from the report of the sub-registrar that on April 22, 1886, the *Arina* was at Newfoundland, and that on that date Stewart, the mortgagee, wrote and informed the plaintiff that he was mortgagee of 60/64th shares in the *Arina*, and that default having been made in the payment of the purchase-money he was obliged to take possession of the ship; he also gave the plaintiff various directions, and informed him that he must notify him of the ship's arrival at Swansea. On May 28 the plaintiff wrote from Newfoundland declining to take instructions from any one but the owner. On July 6, on arriving at Swansea, finding that the owner had absconded, the plaintiff telegraphed to the mortgagee reporting the arrival of the *Arina*. On July 7 the mortgagee, in acknowledging the information, stated that the master's and crew's wages "were all right with him." On July 8 the *Arina* was arrested by the master in an action for wages and disbursements, and on the same day the plaintiff's solicitors wrote asking for evidence that Stewart was mortgagee; on the same day also notice of discharge was given to the master, with a further promise to pay what was due to him if the accounts were at once sent in. On July 10 the mortgagee paid 105*l.* on account of the crew's wages. On July 13 bail in 800*l.* was given for the *Anina*, and on July 21 an order was made for a reference of the plaintiff's claim, and for him to file his accounts. The accounts were filed on August 4. On September 21 they were inspected by the mortgagee, and on October 5, 195*l.* 9*s.* 8*d.* was paid into court. On November 23, the day before the reference, 23*l.* 10*s.* 6*d.* more (making the full amount of the claim) was paid in, which was accepted in settlement of the plaintiff's claim, leaving only for decision at the reference the claim for ten days' double pay, wages to the day of settlement, and costs.

Dec. 14. The motions were argued before the President.

1887. Feb. 7. The case was re-argued by the same counsel before the President and Butt, J.

Cur. adv. vult.

Pyke, for the plaintiff. 43 & 44 Vict. c. 16, is, by s. 1, to be construed as one with the Merchant Shipping Acts, 1854 to 1876. Sect. 191 of the Merchant Shipping Act, 1854, gives a master the same right as a seaman to recover wages; therefore the master has a right to have his wages paid up to their final settlement under 43 & 44 Vict. c. 16, s. 4, sub-s. 4. It has been held that s. 187 of the Merchant Shipping Act, 1854, applies to a master: *The Princess Helena* (1); and the Court, so far as this section is concerned, is concluded by this decision. The wording and object of this section are similar to those of 43 & 44 Vict. c. 16, s. 4, sub-s. 4: so the latter should also apply to a master. The sub-registrar having allowed the plaintiff's claim for double pay under s. 187, should have, therefore, also allowed the wages up to the date of settlement under 43 & 44 Vict. c. 16, s. 4, sub-s. 4. [He also referred to *The Blakeney* (2) and *The Josephine*. (3)]

As to the facts, the master behaved with propriety and prudence, and therefore is entitled to double pay and wages to the date of settlement, and to all the costs.

Bucknill, Q.C., for the defendant, the mortgagee. 43 & 44 Vict. c. 16, s. 4, sub-s. 4, does not apply to a master, for s. 191 of the Merchant Shipping Act, 1854, which is said to make the latter statute applicable to the plaintiff, does not apply to rights created by subsequent statutes. It is clear that this section was not intended to apply to masters, because the payment is in the nature of a penalty arising from a default on the part of the master or owners. The master has to make up his accounts with the owners, and it cannot be supposed that he is to be paid the sum mentioned in s. 4, sub-s. 1, and it is only in default of payment, as mentioned in the first sub-section, that the penalty is to be payable. Sect. 191 of the Merchant Shipping Act, 1854, applies only to the recovery of wages, and the extra payment mentioned in s. 187 is only in the nature of wages, and not such wages as s. 191 applies to, and so the plaintiff is not entitled to recover under s. 187. *The Princess Helena* (1), therefore, was wrongly decided, and so the plaintiff is not entitled to recover either branch of his claim. There has been no default in the payment of wages here, and there was a reasonable dispute; so that, even

(1) Lush. 190. (2) Swa. 428. (3) Swa. 152.

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if s. 4, sub-s. 4, of 43 & 44 Vict. c. 16 applies, on the facts of the case the plaintiff is not entitled to recover.

Pyke, in reply.

Cur. adv. vult.

March 28. The judgment of the Court was delivered by

BUTT, J. This is an action in rem. The plaintiff, a master mariner, claims 219*l.* 0*s.* 2*d.* as the balance of wages and disbursements due to him, and also ten days' double pay and wages up to the date of final settlement. Mr. George Charles Stewart, the mortgagee in possession of the vessel, intervened, and it is between him and the plaintiff that the questions now under consideration have arisen. The amounts were in the ordinary course referred to the registrar, assisted by merchants.

Before the reference came on for hearing the defendant had tendered and paid into Court sums sufficient to satisfy the plaintiff's claim except the sum of 8*l.* 13*s.* 4*d.*, which the plaintiff sought to recover, as ten days' double pay, alleged to be due to him under the provisions of ss. 187 and 191 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and except an amount alleged to be due to him under s. 4 of the Merchant Seamen (Payment of Wages and Rating) Act, 1880, for wages up to "the time of final settlement."

The registrar allowed the ten days' double pay, but disallowed the claim for wages up to final settlement. Against this decision each party has appealed. There is also a question raised as to costs.

Sect. 4 of the Merchant Seamen (Payment of Wages and Rating) Act, 1880 (43 & 44 Vict. c. 16), provides as follows:—

"In the case of foreign-going ships—

"(1.) The owner or master of the ship shall pay to each seaman on account, at the time when he lawfully leaves the ship at the end of his engagement, two pounds, or one fourth of the balance due to him, whichever is least; and shall pay him the remainder of his wages within two clear days (exclusive of any Sunday, fast day in Scotland, or Bank holiday) after he so leaves the ship."

* * * * *

"(4.) In the event of the seaman's wages or any part thereof not being paid or settled as in the section mentioned, then,

unless the delay is due to the act or default of the seaman, or to any reasonable dispute as to liability, or to any other cause not being the act or default of the owner or master, the seaman's wages shall continue to run, and be payable until the time of the final settlement thereof."

But for a case decided by Dr. Lushington in the year 1861, it would have seemed to us clear that the enactment set out above had no reference to master's wages. Sect. 1 provides that "this Act shall be construed as one with the Merchant Shipping Acts, 1854 to 1876, and those Acts and this Act may be cited collectively as the Merchant Shipping Acts, 1854 to 1880."

By the interpretation clause of the Merchant Shipping Act, 1854 (s. 2), the term "seaman" is defined as follows:—"Seaman shall include every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship."

If the matter rested there, the right of the master to wages up to final settlement would seem to be excluded by the very words of the section under which he claims them, no less than by general scope and tenor of the Merchant Seamen's Act, 1880.

Acting in conformity with this view of the matter, the registrar has been in the habit of disallowing claims of masters for wages up to final settlement.

But ss. 187 and 191 of the Merchant Shipping Act, 1854, provide as follows:—

"Sect. 187. The master or owner of every ship shall pay to every seaman his wages within the respective periods following (that is to say), in the case of a home-trade ship, within two days after the termination of the agreement or at the time when such seaman is discharged, whichever first happens; and in the case of all other ships (except ships employed in the southern whale fishery or on other voyages for which seamen by the terms of their agreement are wholly compensated by shares in the profits of the adventure) within three days after the cargo has been delivered, or within five days after the seaman's discharge, whichever first happens; and in all cases the seaman shall at the time of his discharge be entitled to be paid on account a sum equal to one fourth part of the balance due to him; and every master or

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owner who neglects or refuses to make payment in manner aforesaid, without sufficient cause, shall pay to the seaman a sum not exceeding the amount of two days' pay for each of the days during which payment is delayed beyond the respective periods aforesaid, and such sum shall be recoverable as wages."

"Sect. 191. Every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages which by this Act, or by any law or custom, any seaman not being a master has for the recovery of his wages; and if in any proceeding in any Court of Admiralty or Vice-Admiralty touching the claim of a master to wages, any right of set-off or counter-claim is set up, it shall be lawful for such Court to enter into and adjudicate upon all questions and to settle all accounts arising or outstanding and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due."

In the case of *The Princess Helena* (1) Dr. Lushington held that by virtue of these sections a master has the same right to extra payment as the seaman has where his wages have not been paid at the proper time.

The plaintiff contends, that inasmuch as the Merchant Seamen Act, 1880, is to be construed as one with the Merchant Shipping Act, 1854, and inasmuch as s. 191 has been held to give masters of ships the same right to recover extra payment as seamen have, it follows that masters are equally with seamen entitled to recover wages to final settlement.

Assuming the case of *The Princess Helena* (1) to have been rightly decided, this is a contention not easy to answer. If that case is accepted as an accurate exposition of the law on the subject it would seem to force us into giving an effect to s. 4 of the Act of 1880 which we think was not and could not have been intended by the legislature. It is worthy of remark in this connection that s. 4 is by express words limited in its operation to the case of foreign-going ships. In other words to cases in which there are almost invariably accounts to be settled between masters and owner—cases to which as applicable to masters sub-s. 4 could seldom have any effect.

(1) Lush. 190.

Although the decision in the case of *The Princess Helena* (1) has been questioned in the profession, and somewhat reluctantly followed in the registry, it has never been discussed in a Court of Appeal. Under these circumstances, notwithstanding the great weight of any judgment of Dr. Lushington's, and notwithstanding the length of time during which his decision in the case of *The Princess Helena* (1) has been followed, it is necessary to consider the accuracy of the law there stated.

Some of the reasons for a construction of s. 191 different from that put upon it by Dr. Lushington are forcibly stated by that learned judge in his judgment in the case referred to. He says: "Against the right to extra pay, it may be truly said, that in many respects masters stand in a different position from seamen. They are not inopes consilii like the bulk of common seamen. Also, until the passing of the recent statutes, they had in no case a lien for wages on ship, and Lord Tenterden says, 'The master can only sue the owner personally in a court of common law, but as he generally receives the freight and earnings of the ship, and may pay himself out of the money in his hands, he has not often had occasion for the aid of a court of justice to obtain his right.' The master, too, has generally a contract with his owners, which may be deemed a special contract, moreover, he is almost always an accountant to his owners, and it cannot be expected that they should pay him his wages till his receipts and disbursements be accounted for, and the so doing must take time. Then he may delay his accounts, and it is not just that the owners should be mulcted for his neglect. There is still another reason. If the Court should hold that the extra pay may be due, but the right modified or taken away by circumstances, the consequence must be that a door is opened for litigation—a consequence I greatly fear."

Coming to the words of the sections of the Act of 1854 (and for the moment we are dealing with the sections of that Act alone), they appear to us to tell in the same direction. The master is, so far as the case permits, to have the same rights, liens, and remedies for the recovery of his wages which any seaman not being a master has for the recovery of his wages. What is the extra payment in the case of a seaman? Not wages

(1) Lush. 190.

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Butt, J.

stipulated for in the contract of hiring, for it forms no part of that contract, but something over and above the wages contracted for, which under s. 187 "shall be recoverable as wages." If the amount were by the enactment in question made part of the seaman's wages it would seem unnecessary to say that it should be recoverable as wages." In point of fact, it is a penalty or forfeiture imposed on the owner for making default in payment of wages; a penalty, moreover, the amount of which is not fixed by the statute, but which is left to be determined by the Court the words of the section being "shall pay to the seaman a sum *not exceeding* two days' pay for each of the days not exceeding ten days during which payment is delayed."

It is not unworthy of remark that in s. 11 of 5 & 6 Wm. 4, c. 19, a similar payment is expressly called a forfeiture; that section providing as follows:—"And in case any master or owner shall neglect or refuse to make payment in manner aforesaid, he shall for every such neglect or refusal forfeit and pay to the seaman the amount of two days' pay for each day not exceeding ten days during which payment shall without sufficient cause be delayed beyond the period at which such wages or part wages are hereby required to be paid as aforesaid; for the recovery of which forfeiture the seaman shall have the same remedies as he is by law entitled to for the recovery of his wages."

We think, therefore, that the extra payment is not made part of the seamen's wages by s. 187. Even were it otherwise—were the extra payment made part of the seamen's wages—it would by no means follow that s. 191 makes a similar extra payment part of a master's wages. By the words of s. 191 a master is to have, not the same *right to wages* as the seaman, but only the same rights, liens, and remedies for the *recovery* of his wages. It does not purport to give the master any additional wages, but only the same rights, liens, and remedies for the recovery of his wages as the seaman has for the recovery of *his*. This distinction is emphasized by the fact that s. 187 is one of the sections printed under the heading "Legal Right to Wages," whereas s. 191 comes under a different heading, viz., "Mode of Recovering Wages."

One of the reasons to which Dr. Lushington says in the case of *The Princess Helena* (1) that he attributed weight was that

(1) Lush. 190.

the master is not by express terms excluded from the claim to extra payment. With deference, we should have thought the more correct view would be that inasmuch as the extra payment is a penalty, or at least something in the nature of a penalty, imposed on the shipowner in the case of his default in due payment of the seamen's wages, it could only be imposed in the case of the master (who ex hypothesi is not a seaman) by express words.

The extra payment not being by the Act made part of the master's wages, can he nevertheless recover it as a "remedy" for the enforcement of due payment of his wages? The plaintiff contends that even if the extra payment be regarded as a penalty it is one of the means of enforcing due payment of wages given to the seamen, is, in fact, a "remedy" for the recovery of his wages, and therefore enforceable by the master under s. 191.

We do not think this argument maintainable. Before the enactment in question, the master had no lien on the ship for the enforcement of his claim to wages except under 7 & 8 Vict. c. 112, s. 16, in case of the bankruptcy or insolvency of the owner. We think full and ample effect may be given to s. 191 of the Act of 1854 by construing it as giving to masters in all cases a lien, and the consequent remedy in rem, without holding that it also confers upon him the right of recovering a penalty for non-payment of his wages in due time.

For these reasons we have come to the conclusion that neither under the 191st section of the Act of 1854 nor under the 4th section of the Act of 1880 is the plaintiff entitled to the extra payment he seeks to recover in this suit. The result is that the report of the registrar must be varied by striking out the 8*l.* 13*l.* 4*d.* allowed as ten days' double pay.

With reference to the costs, we think each party should bear his own costs of the action and of the reference, but that the defendant having substantially succeeded on the appeal is entitled to the costs of that appeal.

Solicitors for plaintiff: *Pritchard & Sons.*

Solicitors for defendant: *Wynne, Holme, & Wynne.*

E. S. R.

1887

March 30.

TRESS *v.* TRESS.

Restitution of Conjugal Rights—Deed of Separation—Covenant not to sue—Non-appearance of Respondent.

The parties in a suit for restitution of conjugal rights had been living apart under a deed of separation by which the wife covenanted not to take any proceedings to compel her husband to cohabit with her. The husband, who had not fulfilled his covenant to pay his wife 200*l.* a year, did not appear in the suit.

The Court, notwithstanding the covenant in the deed, granted the wife a decree of restitution.

THIS was a suit for restitution of conjugal rights. The parties were married on April 26, 1876, there were two children of the marriage, and in November, 1881, they separated and had ever since lived apart.

On November 11, 1881, a deed of separation was executed by which the husband covenanted to pay his wife 200*l.* a year, and the wife covenanted that she would not "at any time commence or prosecute any action or other proceeding for compelling her husband to allow her any support, maintenance, or alimony whatsoever, or to cohabit or live with her," and further, "in case the parties shall be reconciled to each other and cohabit together, or if their marriage shall be dissolved by any Court of competent jurisdiction, the covenants of the deed shall be void."

The respondent paid ten instalments of 10*l.* each under the deed, and then discontinued payment. On May 12, 1883, a writ was issued in the Queen's Bench Division, to recover the sum of 100*l.* then due, and judgment was obtained under Order XIV., r. 1. On this judgment 50*l.* had been recovered by attachment, but the respondent had made no payment since July 11, 1883.

The respondent had not filed any answer, and did not appear.

The case was heard before the President without a jury, and proof having been given that a formal demand for restitution had been served personally on the respondent.

Searle, for the petitioner, submitted that as the respondent had not appeared to set up the deed, it was not incumbent on the Court of its own motion to take notice of it, especially as he had

not carried out his covenants. [He referred to *Marshall* v. *Marshall.* (1)]

[THE PRESIDENT. There was a subsequent case of *Gandy* v. *Gandy* (2), but the authority of that case was much shaken by what occurred when it came before the Court of Appeal.]

Searle, submitted that the respondent having failed on his part to fulfil the covenants of the deed by non-payment of the annuity, the Court would grant the petitioner a decree of restitution, notwithstanding the covenant not to sue, so as to restore her to the same position she would have been in and to the rights she would have had if no such deed had been executed.

[THE PRESIDENT. The wife is entitled to put it in this way. It may be that the respondent knew of circumstances which would prevent him from successfully pleading the deed. But if there are any circumstances in which the deed would not be binding it lies upon him to put in a valid answer. To put an extreme case, the respondent might have been guilty of some act which, even according to the decision of the Court of Appeal, would relieve the petitioner from the covenant.]

Searle, submitted that the wife ought to be in a position to use the decree as a decree of desertion, so that in the event of her being able to prove adultery she might be able to get a decree of dissolution.

THE PRESIDENT made the decree as prayed.

Solicitor: *E. P. Davis.*

(1) 5 P. D. 19. (2) 7 P. D. 77, 168.

W. L.

1886
Nov. 23.
1887
March 15.

HARRISON *v.* HARRISON.

Divorce—Permanent Maintenance—Husband and Wife entitled to Property in Reversion—Variation of Settlements—Dum Casta et Sola Clause—Court of Divorce Act (20 & 21 *Vict. c.* 85), *s.* 32.

The Court in allotting permanent maintenance will not interfere with reversionary interests except under special circumstances, where for instance it would be otherwise impossible to secure a provision for the wife.

On a petition for permanent maintenance and variation of settlements, after decree absolute at the wife's suit for adultery and cruelty, the registrar found that the respondent would come into possession on the death of a person aged ninety years of a sum which would about double his income. The wife, in addition to the income arising out of a fund in settlement in which she had the first interest, was entitled to a sum in reversion which would also about double her income. The husband had brought nothing into settlement, and the registrar proposed that he should secure to his wife a present annual payment bringing up her income to a third of the joint income, and that on his reversion falling in he should secure a further sum bringing up her future income to the same proportion, taking her reversion also into consideration. The Court refused to confirm this recommendation, but allotted the wife an annual sum equal to one-third of the husband's present income, leaving the reversionary interests of both parties untouched. The Court also declined to insert a dum sola et casta vixerit clause in the order.

In this case a decree absolute for divorce had been pronounced on May 11, 1886, on the petition of the wife, on the grounds of her husband's cruelty and adultery. There were no children of the marriage.

On a petition for variation of settlements and permanent maintenance, it appeared that the only property brought into settlement belonged to the petitioner, and consisted of 1000*l.* invested on mortgage, and producing an income of 40*l.* a year. The petitioner was also entitled to the fifth part of a sum of 5074*l.* 4*s.* 2*d.*, subject to the life interest of a lady seventy-five years of age. The respondent had an income of 400*l.* a year, and had also a reversionary interest, dependent on the life of a lady of ninety years of age, in a sum of which produced an income of from 400*l.* to 450*l.*

The trusts of the settlement were to the petitioner for life, then to the respondent for life, with a power of appointment to

the petitioner, and in default the fund to be disposed of as if she had died intestate.

The registrar recommended in his report that the respondent should pay to the petitioner during their lives or until his reversion fell in the sum of 110*l.* a year, being about one third of the joint income, less the sum of 40*l.* received by the petitioner from the settlement, and after the falling in of his reversion an additional sum of 130*l.*, but that whatever sum the respondent might pay the petititioner it should be reduced by the 40*l.* arising from her reversion when it fell in. The registrar also proposed that the payments should be secured on the whole of the respondent's property including the reversion, and that the respondent's life interest in the settlement should be extinguished.

Bayford, Q.C. (*Barnard,* with him), for the petitioner. The 32nd section of the Court of Divorce Act empowers the Court to make such order as it shall deem reasonable having regard to the husband's means and the conduct of the parties. It has been the custom to secure this on the husband's whole property, and here the husband is in possession of an actual income, and is also in possession of a vested reversionary interest which has a present value, and which he can deal with at once if he thinks fit.

The Court instead of an annual payment may order a gross sum to be secured, in which case the value of the reversion would be estimated.

As to the dum sola et casta clause, that is entirely in the discretion of the Court, and if it is inserted at all there must be something in the case which takes it out of the ordinary rule. If such an order is made this is not the proper time for making it. He referred to *Medley* v. *Medley* (1); *Hart* v. *Hart* (2), and *Gladstone* v. *Gladstone.* (3)

Inderwick, Q.C. (*Searle* with him), for the respondent. The 32nd section does not give the Court power to deal with any other property of the husband but that of which he is in actual possession. As to the dum casta clause, on every occasion where the husband has been ordered to make provision for a wife out of his

(1) 7 P. D. 122.

(2) 18 Ch. D. 671.

(3) 1 P. D. 442.

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HARRISON v. HARRISON.

own money this clause has been inserted. The question of the wife's maintenance where a decree absolute has been pronounced has been frequently discussed, and though different views may have been taken by your Lordship's predecessors as to the amount to be given to the wife, they both agreed on the condition that she would cease to receive the income allotted to her if she became unchaste or married again: *Fisher* v. *Fisher*. (1)

Cur. adv. vult.

BUTT, J. This was a motion to confirm the registrar's report.

On May 11, 1886, a decree absolute dissolving the marriage on the ground of the husband's cruelty and adultery was made.

On August 10 last an order was made confirming the report of the registrar, in so far as it recommended the extinguishing of the respondent's (husband's) interest under the marriage settlement, the only property brought into settlement being the wife's. But the decision upon that part of the report which dealt with the wife's petition for maintenance was reserved for further consideration.

The registrar has found the respondent's present income to be 400*l.* a year, derived from stocks and other securities, and that on the death of a lady over ninety years of age he will be entitled to property producing a further income of 400*l.* to 500*l.* a year.

The petitioner has also a reversionary interest in one-fifth part of the sum of 5074*l.* 4*s.* 2*d.*, subject to the life interest of a lady over seventy-five. The present joint income of husband and wife is 440*l.*, the latter being possessed of 40*l.* a year under her settlement.

The principal question is whether the husband's reversionary interest mentioned above is to be taken into account, and if so, in what way, in the determination of the amount of the permanent maintenance to be paid to the wife.

The registrar has submitted that "the respondent should be ordered to secure to the petitioner during their lives, or until his reversion falls in, the annual sum of 110*l.*, being about one-third of the joint income, less the sum of 40*l.* now received by the petitioner, and after the falling in of the respondent's

(1) 2 S. & T. 410.

reversion the additional sum of 130*l.* a year, but that whatever amount the respondent may be paying to the petitioner should be reduced by the sum of 40*l.* when the petitioner's reversion falls into possession."

On the part of the respondent it is contended that under s. 32 of 20 & 21 Vict. c. 85, the Court has no power to deal with a reversionary interest of the husband, or with income other than his income at the time of the dissolution of the marriage. Although I cannot accede to that argument to its full extent, I have come to the conclusion that the present income of the husband should alone be dealt with, and that reversionary interests should not be resorted to, except under special circumstances, as for instance where there are no other means of insuring provision for the wife.

Taking into consideration all the circumstances of this case, I shall direct that the respondent do secure to the petitioner, during their lives, the annual sum of 130*l.*, being about one-third of his income, leaving the petitioner, over and above that amount, in possession of the 40*l.* a year, the respondent's interest in which under the settlement is to be extinguished, and leaving the reversionary interests of both husband and wife untouched.

With regard to the question whether the deed securing to the wife the above mentioned annual sum should contain the clause "dum sola et casta vixerit," I gather from the cases cited that it is not usual for the Court to insert any direction as to that in the order, and I decline to do so.

Solicitors for petitioner: *Hughes & Son.*
Solicitors for respondent: *A. J. Cox.*

W. L.

1887
March 15.

IN THE GOODS OF MALEY.

Will — Mutilation — Revocation of Appointment of Executors — Trustees — Executors according to the Tenor.

A testator by his will appointed two executors, with the usual directions as to payment of debts, &c. He also appointed the same persons trustees, with directions to pay the income arising from his property to his wife and his only son in equal shares during her life or widowhood, and after her death or re-marriage the whole estate was bequeathed to the son absolutely. There were also alternative trusts in the case of the son dying in the wife's lifetime, either unmarried or married leaving children.

After his death the will was found with the clause appointing executors cut out of it, and there was evidence of declarations by the testator that he had cut it out with a pair of scissors, with the intention of cutting out the name of one of the executors.

The wife died in the lifetime of the testator, and in the events which had happened at his death the son was the only person entitled to the estate:—

Held, that the appointment of executors was revoked by the mutilation of the will; that the trustees were not executors according to the tenor; and that the son was entitled to a grant of administration with the will annexed.

APPLICATION for a grant of administration with the will annexed.

It appeared that Matthias Maley, late of Chesterton, in the county of Cambridge, deceased, died February 28, 1887, leaving a will duly executed, bearing date July 21, 1880. The will commenced by the usual direction that all his just debts, funeral and testamentary expenses should be paid by his executors, and it nominated George Clark and John Maley his trustees, and bequeathed to them all the property of which he might die possessed or to which he might be entitled, whether real or personal, on the following trusts: "to pay and divide the clear net rent thereof, together with the interests and dividends accrued upon the said shares and all other income arising out of my said real and personal estate, equally between my wife Ann and my son Martin Andrew, share and share alike, the share of my said wife to be paid during such time only as she shall continue my widow, and upon her decease or marriage I bequeath the whole of my said trust property to my son Martin Andrew absolutely. In the event of the death of my said son in the lifetime of my said wife, then I direct my said trustees or trustee to pay out of the income

of the said trust property to my said wife during her lifetime or widowhood as aforesaid, the sum of 50*l.* per annum, payable at such times as my said trustees or trustee in their discretion shall think fit, and to pay the balance of the said income (in the event of my said son dying unmarried) to my nephew John Maley during his life. In the event of my said son dying married and leaving a child or children him surviving, then I direct my said trustees or trustee to apply the whole or the balance of the said income whilst my wife lives for or towards the maintenance, advancement, and education of his child or children."

Finally, the will bequeathed a legacy of 50*l.* to George Clark if he should act in the trusts, and it appointed him and John Maley as his executors.

The testator's wife died in his lifetime, and in the events which had happened his son Martin Andrew Maley had become the universal legatee of the deceased and the sole person beneficially interested in the will. The estate of deceased consisted entirely of personalty.

Shortly before the death of the testator, a dispute arose between him and George Clark respecting certain houses belonging to the deceased at Folkstone, of the leases of which he alleged Clark had obtained possession improperly; and at the time of his death there was an action pending against Clark in the Chancery Division.

The will when produced after death was found to be mutilated, and the part relating to the legacy to Clark and the appointment of executors had been cut out. It appeared that deceased, after the dispute between himself and Clark had arisen, had told a friend that he had "cut that rascal Clark out of his will," and being asked how he had done it, replied, "With a pair of scissors." The piece which the testator had cut out of the will was found with it in the same bag.

Searle, moved for a grant of administration with the will annexed to the son, Andrew Martin Maley. The appointment of executors is clearly revoked, and with that appointment the clause directing the payment of debts, &c., also goes. The trustees,

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IN THE GOODS OF MALEY.

therefore, are not executors according to the tenor, and there is nothing for them to do as trustees. They are bare trustees, as in the events that have happened the applicant is entitled to the whole of the property. All the trusts named in the will only come into operation in the event of the son dying in the lifetime of his mother, whereas he has survived his mother.

Davis, for the executors. The first question is whether there was an intention to revoke. Though a piece was cut out of the will the testator preserved the piece in the same bag.

[THE PRESIDENT. I should be disposed to say that there was an intention to revoke the appointment of executors, and of course there would be a revocation of the duties appointed to them to perform.]

Still the trustees would not be bare trustees, for though the son takes all the trust property, there are trusts in the event of his marrying and leaving children surviving him.

THE PRESIDENT. Any decisions which I give on these motions are not conclusive. They do not prevent the parties litigating the matter if they think fit, and I am only here giving a provisional decree according to the best view I can form, for the specific purpose of creating a representative to the estate. I am of opinion that by cutting out this piece of the will the testator intended to revoke, and did revoke, the appointment of executors, and with that, of course, go the directions as to what the executors are to do. It is perfectly true that there are trustees, of whom Clark is one, and that in the event of the son dying in the lifetime of his mother the trustees were to pay her the sum of 50*l.* annually, and further, they were to pay the balance of the income of the estate to his nephew. The will also directs that if the son married and left children the trustees were to apply the whole of the balance of the said income to their maintenance, advancement, and education. All these trusts appear to me to be limited to the event of the wife surviving and the son dying in her lifetime.

I am of opinion that the construction which Mr. Searle has put on the will is the true one. The testator says, in the events which have happened I bequeath the whole of my trust property to

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my son absolutely. It is perfectly true, as the learned counsel on the other side says, that it might afterwards have happened that the son would not be so entitled, but the contingency did not arise. It appears to me perfectly clear that the testator did not intend to cut down this absolute gift in the events which have actually occurred. The will directs that in the event of the son surviving his mother he should be absolutely entitled. As matters stand now, and in the events which have happened, the absolute gift to the son takes place. He is the person who is now entitled to this property, and he is, therefore, the person to whom the grant should be made.

Solicitor for applicant: *E. Upton.*

Solicitors for defendant: *Tarrant & Mackrell.*

W. L.

IN THE GOODS OF AMELIA PRICE.

1886 *Dec.* 13.

1887 *March* 22.

Probate—Will of Married Woman—General Grant—Practice—Married Women's Property Act (45 & 46 *Vict. c.* 75), *s.* 1.

The limitation inserted before the Married Women's Property Act, 1882, in the probate of the will of a married woman ought no longer to be required, and the Court will henceforth make a general grant.

AMELIA PRICE duly executed her last will on February 5, 1885, being at the time the wife of Mr. Joseph Price, who survived her. By her will she bequeathed all her real and personal estate to her daughter Frances Amelia Price, and she appointed Francis Joseph Price and Frances Amelia Price her executors.

Her estate consisted partly of a reversion which at the date of the will and at the time of her death was her separate estate, and which she could have sold without the concurrence of her husband, and partly of stocks standing in her name.

The will was not made in the execution of a power, and the date of the marriage of the testatrix was before the passing of the Married Women's Property Act.

Houghton, moved for a general grant without any words of limitation. By the Married Women's Property Act a married woman can dispose of her real or personal estate as if she were a

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IN THE GOODS OF PRICE.

feme sole, and a limited grant therefore is no longer applicable. (1)

BUTT, J. This is an application for granting probate of a will of a married woman disposing of her separate property. The will was dated February 5, 1885, and the executor and executrix appointed under the will applied to the registry for a general grant. This was refused as contrary to the prevailing practice. Thereupon application was made to me by motion to direct a grant to issue without the usual words, limiting it not only "to such property as the testatrix had a right to dispose of," but also "to such property as she has disposed of by her will." It was contended that since the Married Women's Property Act, 1882, no reason exists for limiting the grant. Although I understand the grounds on which the practice was based I have not been able to satisfy myself of its necessity even before the Act of 1882. Now, at all events since that Act, a married woman having full power to dispose of her separate estate, I think the limitation ought no longer to be insisted on.

The policy of recent legislation having been to place a married woman, so far as her separate estate is concerned, in the position of a feme sole, I direct probate to issue as prayed.

As this will alter a long established practice, I thought it right to speak to the President before deciding this case, and I may say that he approves of the course which I am now taking.

Solicitors: *Tatham, Son, & Lousada.*

NOTE.—On May 17th, in "*In the Goods of Elizabeth Ann Homfray*," a married woman, who died before the passing of the Married Women's Property Act, on May 9th, 1880, leaving a will and two codicils executed under a power but disposing of property not included in the power;—*Searle* moved for a grant limited in the old form to the personal estate which she had a right to dispose of by will,—but the Court held that under the new rules the grant could no longer be limited but must be in a general form.

The following is the substance of the New Rules, 15 & 18, passed March 29th, 1887:—"In a grant of probate of the will of a married woman, or of the

(1) The material words of the Married Women's Property Act (45 & 46 Vict. c. 75), s. 1, sub-s. 1, are: "A married woman shall be capable of holding and disposing by will or otherwise of any real or personal property as her separate property in the same manner as if she were a feme sole."

will of a widow made during coverture, or letters of administration with such wills annexed, it shall not be necessary to recite in the grant or in the oath to lead the same the separate personal estate of the testatrix or the power or authority under which the will has been or purports to have been made. The probate or letters of administration with will annexed in such cases shall take the form of ordinary grants of probate or letters of administration with will annexed, without any exception or limitation, and issue to an executor or other person authorized in the usual course of representation to take the same; a surviving husband, however, being entitled to the same in preference to the next of kin of the testatrix in case of a partial intestacy.

W. L.

THE CLAN GRANT.

March 29.

Pilotage—River Thames—Order in Council, May 17, 1882.

A pilot who brings a ship from Gravesend to the entrance of the Tilbury Docks, and thence into the docks, is not entitled under the Order in Council of May 17, 1882, to the special charge "for removing a vessel from moorings into a dry or wet dock" or to charge any sum other than the rate from Gravesend to Northfleet.

ACTION for money due for pilotage services.

The plaintiff was a duly licensed Trinity House pilot, and he claimed a sum from the owners of the *Clan Grant* for services rendered. The plaintiff's claim was twofold, first, for piloting the *Clan Grant* from Gravesend to the entrance of the Tilbury Docks; second, for taking the vessel into the Tilbury Docks from the entrance.

The defendants admitted the first part of the claim of the plaintiff and disputed the second part. The question turned on the construction of an Order in Council of May 17, 1882 (made before the completion of the Tilbury Docks), which contained a table of the rates of pilotage to be demanded and received by pilots licensed by the Corporation of the Trinity House of Deptford Stroud. The first part of the plaintiff's claim—which was admitted—and the amount of which the defendants had been ready and willing to pay, was for pilotage from Gravesend Reach to Northfleet, being the amount shewn to be due in the said table.

The second part of the claim was based on the following clause in the Order in Council:—

"For removing a ship or vessel from moorings into a dry or

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wet dock, or from one part of the river situated above Greenwich to another part of the river so situated; or for mooring or unmooring a vessel with two anchors; or for putting a vessel alongside a pier or wharf and remaining while cattle or merchandise are being discharged or taken on board; or for mooring vessels laden with petroleum in accordance with the harbour regulations; or for attendance while adjusting compasses, the following charge may be made in addition to the pilotage:

	£	s.
For a ship above 1000 tons	1	10."

Bucknill, Q.C., and *Raikes*, for the plaintiff. The plaintiff is entitled to be paid for his services in taking this vessel into dock, and it is clear that as a duly licensed pilot can only charge specified fees the Order in Council must be applicable to this part of his service. If the plaintiff cannot recover under this head, he gets no remuneration at all unless he charges for his services under the heading in the order "From Gravesend reach (and vice versâ) to moorings, London Docks, City Canal or St. Katharine's Docks," for which a much higher rate is allowed. When the vessel is berthed at the entrance of the dock she has arrived at her "moorings:" *The Adah* (1).

Cohen, Q.C., and *Hollams*, for the defendants. The plaintiff is not entitled to make this charge. By 17 & 18 Vict. c. 104, s. 358, a pilot can only charge "the rate for the time being demandable by law." There is no such rate specified for this particular service, and so the plaintiff cannot recover a special sum for docking this vessel.

Bucknill, Q.C., in reply.

BUTT, J. In this case I cannot express an opinion as to whether the amount charged by the plaintiff under the words of this table, and which, it is admitted, is due to him, is sufficient remuneration for the whole amount of work which he has done. I can do no more than give a judgment according to the terms of this particular table. When it was drawn up the Tilbury Docks were not in existence, and therefore there is no express

(1) 2 Hagg. 326.

provision applicable to them. Under these circumstances the plaintiff has resorted to a part of the order under which it has been argued he is entitled to make this charge for docking the *Clan Grant*, the first part of the service being placed under the head of pilotage from Gravesend to Northfleet. In my opinion this is the only amount which the plaintiff can recover. He clearly cannot bring himself under that part of the Order in Council beginning "for removing a ship or vessel from moorings into a dry or wet dock."

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It has been argued that the plaintiff was entitled to make a charge under the heading of "From Gravesend to moorings." But, in my opinion, "moorings," as used in this Order in Council, does not mean a vessel's berth at the entrance of a dock into which she is about to enter. Therefore, there must be judgment for the defendants, as the only contest has been in regard to the second part of the plaintiff's claim.

Solicitors for plaintiff: *Marshall & Haslip.*

Solicitors for defendants: *Hollams, Son, & Coward.*

E. S. R.

IN THE GOODS OF HENRIETTA G. MORTON.

April 26.

Will—Revocation—Scratching out Signatures—Wills Act (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 20.

A will which after execution had remained in the custody of deceased was found in her repositories after her death with her own signature and the signatures of the attesting witnesses scratched out as with a knife:—

Held, that there was a revocation within the requirements of s. 20 of the Wills Act.

HENRIETTA G. MORTON, late of Newcastle-on-Tyne, deceased, died January 26, 1887, having duly executed a last will bearing date September 16, 1853. After her death the will, which had remained in her possession, was found in a trunk with the signatures of the testatrix and the attesting witnesses scratched out as if with a penknife. At the bottom of the will there was a memorandum in the handwriting of the deceased, dated "November, Saturday, 1861"—but not executed—whereby for reasons given the will was declared to be cancelled.

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Searle, moved for a grant of administration to Sarah Francis Morton, the sole surviving sister and next of kin of deceased, as in case of an intestacy. There does not appear to have been any case exactly in point where cancellation was effected by scratching out. It has been held that cutting out a signature is a revocation within the meaning of the 20th section of the Wills Act: *Hobbs* v. *Knight* (1); *Bell* v. *Fothergill* (2); and a will written in pencil would be destroyed by erasing the words by india-rubber (3); but, on the other hand, it has been held that striking out with a pen is not sufficient.

BUTT, J. I do not think there is any difficulty in the case. What the testatrix did may be regarded as a lateral cutting out. The paper is not pierced but the signatures are scratched away. I think the will has been revoked, and I grant administration to the applicant.

Solicitors: *Tippetts & Son.*

W. L.

May 5.

GORNALL *v.* MASON.

Probate—Will—Execution—Evidence—Attesting Witness not to be found—Affidavit of attesting Witness at the Time of granting Probate—Order XXXVII., r. 1.

In a suit for revocation of probate on the grounds of undue execution, and incapacity, where it appeared that every effort had been made to find one of the attesting witnesses but without success—the Court allowed the affidavit made by him eight years before, at the time of proving the will at the district registry, to be admitted as evidence of execution and capacity.

THIS was a suit for the revocation of the probate of the last will and testament of James Gornall, late of Fleetwood, in the county of Lancaster, which had been granted on December 4, 1879, to the executors named in it, Joshua Mason and Mary Gornall, the widow of the deceased.

The testator was a master mariner who died at Barrow-in-Furness, August 23, 1878, and the will in dispute bore date

(1) 1 Curt. 768. (2) Law Rep. 2 P. & M. 148.
(3) Lord St. Leonard's Handy Book, 8th ed., p. 250.

August 22, 1878. It bequeathed all the real and personal estate to the widow during her lifetime and after her death the residue to be divided between the testator's daughters equally.

The widow of the deceased died intestate June 18, 1886.

The plaintiff in the present suit was the testator's eldest son, and in his statement of claim he alleged that the will was not duly executed and that the testator was not of sound mind, memory, and understanding.

The testator executed the will by making his mark, and at the time of the granting of the probate in the district registry at Lancaster, Charles Hanson, one of the attesting witnesses, made the following affidavit :—

"I, Charles Hanson, of 83 Dalton Road, Barrow, in the county of Lancaster, and late of the James and Mary, of Fleetwood, make oath that I am one of the subscribing witnesses to the last will and testament of James Gornall, late of Fleetwood, in the county aforesaid, master mariner, deceased, the said will being hereunto annexed, bearing date the 22nd day of August, one thousand eight hundred and seventy eight, and that the said testator executed the said will on the day of the date thereof by making his mark at the foot or end thereof as the same now appears thereon in the presence of me and of John Dickinson, the other subscribed witness thereto, both of us being present at the same time and we thereupon attested and subscribed the said will in the presence of the said testator, and that the said will was first read over to the said deceased, and that he appeared to understand the same."

The case was heard before Butt, J., without a jury. After the surviving executor and other witnesses had been examined and evidence had been given that every effort had been made to find Hanson without success.

Searle, for the defendant, tendered the affidavit made by Hanson at the proving of the will, which he submitted was receivable under Order XXXVII., r. 1. (1) No doubt there is

(1) The following is the material portion of the order :—"But the Court or a judge may at any time for sufficient reason order that any particular facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or judge may

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a bonâ fide desire to cross-examine the witness, and the proviso shews that the case of the witness not being produced was contemplated. Here it is proved that the witness cannot be found.

Bayford, Q.C., for the plaintiff, submitted that the affidavit was not evidence. The rule only applies where an affidavit is made in the course of a suit. It cannot be suggested that because a person has made an affidavit on a matter not between the parties a long time ago, it can be made evidence not because he is dead, but simply because he cannot be found. If he were dead the affidavit would not be admissible. No order has been made that this case should be tried by affidavit, and it must be tried therefore in the ordinary way.

Cur. adv. vult.

BUTT, J. I have given some consideration to this matter and I am prepared to decide it if necessary. I had doubts about it—but on the whole I have a strong feeling that, under the special circumstances of the case and the delay of eight years, it would be a great injustice to exclude the affidavit. I shall admit it though with doubt and hesitation.

Solicitors for plaintiff: *Shaw & Tremellen.*

Solicitors for defendant: *Tahourdins & Hargreaves, for Johnson & Tilly, Lancaster.*

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think reasonable: provided that where it appears to the Court or judge that the other party bonâ fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit."

W. L.

HARRISON *v.* HARRISON. 1887 *May* 25.

In this case, which is reported ante, p. 130,

Butt, J., in chambers, on May 25 corrected the order by directing that the respondent should secure to the petitioner the sum named "during her life"; the original words "during their lives" having been inserted by reason of a clerical error in drawing up the registrar's report.

THE JUSTITIA. *May* 10, 11.

Seaman—Agreement for Service—Breach by Shipowner—Damages.

In an action by a seaman for breach of the stipulations in his agreement for service, the Court, in addition to the compensation provided by the Merchant Shipping Act, 1854, can award general damages for breach of the agreement, and for hardships incurred by the seaman through the vessel being employed for purposes other than those contemplated by the agreement.

Action for wages, for double pay, under s. 187, for compensation for improper food under s. 223 of the Merchant Shipping Act, 1854, and for damages.

The plaintiffs, who were seamen, were engaged to serve on the *Justitia*. By the terms of the agreement the voyage was to be from London to Antwerp, thence to Trinidad, where the plaintiffs were to be discharged within one month of the ship's arrival, and a passage to be found them to the United Kingdom, and their wages to be paid up to the time of their arrival in the United Kingdom.

It was proved that the *Justitia* sailed from London on June 4, and at Antwerp took in some cases of arms and ammunition, that on her arrival in the West Indies, instead of proceeding to Trinidad, she went to the coast of Venezuela, where a number of armed insurgents came on board; the *Justitia* being in fact intended as an insurgent cruiser. Attempts were made to induce the plaintiffs to take service with the insurgents, but they refused to do so. For some time however, they were obliged to remain

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on board the *Justitia*, and during such time the *Justitia* was acting as an armed cruiser, and on one occasion engaged in a fight with a Venezuelan gunboat, and the plaintiffs suffered privations and incurred risks to their life and health.

The *Justitia* having put in to San Domingo on July 26, was seized by the Government of that place, and the plaintiffs then returned home, after some delay. The plaintiffs had only received one month's pay.

The action was in personam against two persons alleged to be owners of the *Justitia* at the time when the plaintiffs commenced their service on board of her, and against the master by whom they were engaged.

By paragraph 10 of the statement of claim it was alleged that the plaintiffs suffered damage by not being discharged according to the terms of their agreement, by not having their passage home provided, by being detained on the *Justitia*, and by being exposed to the dangers incident to the service in which the ship was used.

Sir W. Phillimore, and *Stokes*, for the plaintiffs.

Nelson, for the defendants.

Sir W. Phillimore, as shewing that the Court had jurisdiction to grant general damages, referred to *Wood* v. *Germain* (1) and *Drew* v. *Hardwick*. (2)

THE PRESIDENT (after deciding that the plaintiffs had proved their case and that they were entitled to wages as claimed, and to an allowance in consequence of bad food, proceeded:—) I am glad to have been informed that there are some old authorities in which the jurisdiction of this Court to give damages to seamen is recognised, for I am of opinion that if seamen are subjected to wrongs of the kind here proved, they should on principle have a remedy in this Court. Clearly the present case is one in which it is right that the Court should award general damages as prayed in the statement of claim. But the matter is one of some obscurity, it depends on a variety of circumstances which I am unable to estimate exactly. In fact, it is impossible for me to

(1) Admiralty Cases, 1648–1840, edited by R. G. Marsden, 311.
(2) Ibid. p. 315.

know precisely the damages which each of the plaintiffs has suffered. I shall therefore award 10*l.* to each man for the general damage which he has sustained. There will be judgment for the plaintiffs with costs.

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Solicitors for the plaintiffs: *Stokes, Saunders, & Stokes.*
Solicitors for defendants: *Lowless & Co.*

E. S. R.

THE FIRE QUEEN.

April 1, 2.

Collision—Sailing Rules—Regulations for Preventing Collisions at Sea, art. 3 *—Mersey Rules, rule* 5.

At the trial of an action for damage by collision, it appeared that the starboard light of the plaintiffs' vessel was obscured by the cathead to an extent of from 2½ to 3 degrees; but that with this exception her side lights shewed an unbroken light over 10 points of the horizon:—

Held, that there was no such infringement of art. 3 of the Regulations for Preventing Collisions at Sea as to oblige the Court, under the Merchant Shipping Act, 1873, s. 17, to hold the vessel to blame for the collision.

It also appeared that the stern light of the plaintiffs' vessel was placed on deck abaft a house on the after part of the deck:—

Held, that this was an infringement of rule 5 of the Mersey Rules, but the Court, having regard to the position of the plaintiffs' and the defendants' vessels, *held*, that the infringement could not have contributed to the collision.

ACTION of damage by collision.

The facts of the case are fully stated in the judgment of the Court, except that it is not there mentioned that the stern light on the *Nordens Dronning* was placed on the deck abaft a house in the after part of the deck, and that owing to the lower part of the bulwarks being solid it could not have been properly seen.

The questions for the Court turned on the construction of Art. 3 (1) of the Regulations for Preventing Collisions at Sea and rule 5 (2) of the Mersey Rules.

(1) Art. 3 (*b.*): A seagoing steamship when under way shall carry—"On the starboard side, a green light so constructed as to shew an uniform and unbroken light over an arc of the horizon of 10 points of the compass; so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible on a dark night with a clear atmosphere, at a distance of at least two miles."

(2) Mersey Rules, 1881, rule 5: "Instead of the light prescribed by art. 11 of the said Regulations, a bright white light, similar to the light

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Sir W. Phillimore, and *Stubbs*, for the plaintiffs, the owners of the *Nordens Dronning*.

Kennedy, Q.C., and *Pickford*, for the defendants, the owners of the *Fire Queen*.

BUTT, J. In this case the plaintiffs' vessel, the barque *Nordens Dronning*, was in tow of a steam-tug called the *Great Western*. She had come into the River Mersey and was about to be rounded to, by the tug, to bring her head upon tide. The tug and the vessel in tow came up on the western or Cheshire side of the river, and when those whose duty it was to direct the navigation thought the time had come to turn the ship the proper measures were taken for so doing, and the barque and tug began to come round. At that time the steamer *Fire Queen*, the defendants' ship, was coming down somewhere about halfway between mid river and the eastern shore, navigating in that which was her own water. I see no reason to suppose that in the state of things existing, the tug and her tow were not justified in putting their helms a starboard, and going round when and where, and as they did.

The case set up on behalf of the steam-ship *Fire Queen*, is this: Those on board say, As we came down the eastern side of the river we first became aware of the existence of some vessel ahead, or nearly ahead of us, by seeing what afterwards proved to be the single white light at the masthead of the steam-tug; that was not more than 400 or 500 yards distant. It has been contended on the part of the *Fire Queen* that those on board of her could not see the tug's light, which they admit to have been a good one—I am speaking of only one light at present—at a greater distance on account of the thickness of the weather. The master of the *Fire Queen* says, "I thought that was the light of a vessel at anchor; it was slightly on my port bow, and I intended to go down inside of it, leaving it on my port hand, when suddenly, not long after that light was seen, a second light, namely, a green light, apparently on board the same ship, was also seen on the

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mentioned in rule 4, shall be shewn continuously from the stern rail of every vessel while under way and in motion, in all weathers between sunset and sunrise."

quarter. Whereupon I assumed that they were the lights of a steamer standing in across the river towards the eastern shore. I gave the order at once to starboard the helm. I cleared the vessel with the lights, and then if there had been nothing behind her there would have been no danger; but it turned out that that tug had a barque in tow, and I ran into the starboard broadside of that barque. I should not have done so if the proper indications had been given me of there being a vessel in tow of the tug."

What indications had the officer in charge of the *Fire Queen* a right to have? He had a right in the first instance to have a warning that there was a vessel in tow given him by two lights at the masthead of the tug, and he had a right to have another warning given him by a green light of the ship in tow. Possibly—although that I do not think can be successfully maintained—he may say, "I had the right also to have a third warning by a white stern light." Now, he says, "I had none of these warnings. I had a right, on the assumption that the white light I saw and this green light of the same vessel were the lights of a steamer not towing, to act as I did." The most important matter to determine in this case is, had that tug one, or two, good lights at her masthead, for an inefficient light is practically no better than no light at all.

Now there is a strong body of evidence to the effect that the tug had had, up to the time of collision, had at the time of collision, and continued to have after the collision, two perfectly good lights at her masthead.

There is a strong body of evidence on the other side that she never had after she got into the Mersey any good light, save one at her masthead; and that at the time of the collision and at the time just preceding it she had no light of any sort at her masthead, but one. I have to determine that, but before I advert further to that question of fact, there are other matters to be dealt with. First of all I have to consider whether the barque carried a good green light? I have no hesitation in finding at once that she did. I am speaking of the *carriage* of the light, and not of its position.

Secondly, was it a light properly fixed? That is, was the

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carrying of that light where, and as it was carried a compliance with, or a departure from, the Regulations for Preventing Collisions at Sea, which by Order in Council are applicable to the Mersey.

Now this, like other vessels, has a cathead, and in one sense, no doubt, the cathead was in the way of the light. I think both sides have given fair and honest evidence as to the amount of the obstruction of that light. The result comes to this, that the cathead obscured the side light for some two and a half or possibly three degrees—that is considerably less than the third of a point—on the vessel's bow. And that save for that third of a point her side lights shewed an unbroken light over ten points of the horizon.

Is it a breach of the regulations for a vessel to have her lights obscured to the extent I have described? It is certain that a literal compliance with these Regulations is not intended. A literal compliance with them is an impossibility. I will take an instance—a vessel at anchor is to carry not more than twenty feet above the hull a light which shall shew an unbroken light all round the horizon. If a vessel has any mast or rope which runs to a greater height than the prescribed twenty feet above the water, it is utterly impossible that any lantern hung at that height could shew an unbroken light all round the horizon. A number of other instances might be given, I am only pointing out that the letter of the Regulations cannot be complied with. What we must look to is, whether there is a reasonable compliance with the Regulations?

Several surveyors have been called, and amongst others a gentleman whose evidence is entitled to be treated with every respect, Mr. Laslett, the Board of Trade Surveyor. What does his evidence come to? He says: "I should not have passed these lights in the position in which they were placed, and having regard to the position of the cathead." And he described to what extent on either bow the light would be obscured. But he was asked as to what the Board of Trade would do, and he produced his instructions. The result of following them is, that he gets out of one difficulty into another. The Board of Trade is careful not to have any obscuration of the light on either bow from right

ahead; but in obtaining that desideratum it causes a departure from the rule, which to my mind is a far more serious matter. It turns out that Mr. Laslett would have passed this vessel if her cathead had been removed, although there would be a greater degree of error, in the sense that each side light would then be seen across the bow of the vessel. I do not know how these Regulations are to be worked out. There cannot be a strict compliance with their letter.

I am strongly inclined to believe that the right thing to aim at would be to adhere to the arc of ten points, starting from two points abaft the beam, and to carry the light so as to allow it to be seen no further forward than an arc of ten points would allow. That would leave, if it were exactly carried out, and the ship were motionless, a space in darkness right ahead equivalent to the beam of the ship, but the lights would not then be visible across the stem.

The question here is whether the departure from the strict requirements of this rule is a departure which is under the circumstances unreasonable; whether, because this cathead obscured the light of the vessel to the extent I have described, two and a half degrees or three degrees on the vessel's bows, it is a breach of the rules which is to entail the very severe penalty enacted by the 17th section of the Merchant Shipping Act of 1873. I am not inclined to say it is; I have asked the Elder Brethren, and they agree with me in thinking that there was a reasonable compliance with the rule regarding lights. The *Nordens Dronning* is therefore not to blame for having the green light carried where it was, having regard to the position of the cathead.

I asked Mr. Laslett this question, how he would fix the lights? And he said they should be carried farther forward, and he would place them some three feet higher, and that would be a way of obviating the difficulty. But he obviates one difficulty by running into another; the Elder Brethren tell me that if that suggestion were complied with there would probably be a serious obscuration of the light by the head sails of the vessel.

I have been dealing with this merely as a question under the statute. When I come to the merits of the case, I have not the slightest doubt as a matter of fact that the obscuration, as far as

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it was an obscuration, of the green light by this cathead, had nothing to do with this collision. Because I have no doubt that the two vessels, the *Fire Queen* and the *Nordens Dronning*, were in such positions that that cathead never could have obscured the light of the barque from those on board the *Fire Queen*, and that it ought to have been seen earlier by them. They did not see it, and they starboarded into that ship.

I come now to the stern light. I have already intimated in the course of the case, after consulting with the Elder Brethren, that the stern light was improperly placed, and that its position constituted a breach of the Regulation, which applies to the River Mersey. It is a regulation having statutory effect, and the breach of which entails the statutory penalty imposed by s. 17 of the Act of 1873. (1) Had the improper position of that light any effect on the collision? I have no hesitation in saying it had not. But then it was said, that is not the question. Could it have had any effect on this collision? It appears to me it would be a proper compliance with article 5 of the Mersey Regulations to hang a white globe lantern from the centre of the taffrail of the vessel, so that it would hang a foot or eighteen inches below the taffrail. The Elder Brethren agree with me in this, that the real intention in prescribing these stern lights, as they are called, is to have them so placed that they shall not be seen in front of the stern. However, taking it that that would have been a compliance, what follows? Why, that had it been there, by no possibility could those on board the *Fire Queen* have seen it before the collision. I know that one or two of the plaintiffs' witnesses, when asked to place models on the paper or on the table from which diagrams were drawn, put the vessels in the position in which the stern light, carried as I have suggested it should be, would have been seen from the *Fire Queen*. But I do not accept that as the correct

(1) 36 & 37 Vict. c. 85, s. 17: "If, in any case of collision, it is proved to the Court before which the case is tried that any of the Regulation for Preventing Collision contained in or made under the Merchant Shipping Acts, 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary.

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view of things. The vessels were never, and never could have been in the position indicated by these diagrams. But taking it that the collision between the *Fire Queen* and the *Nordens Dronning* was either a right-angled blow, delivered by the stem of the *Fire Queen*, or a blow, as the captain of the *Fire Queen* put it, leading aft, on the *Nordens Dronning*, it follows, having regard to the fact that both vessels were under a starboard helm at the time and before the collision, that the *Fire Queen* never could have been in a position to have seen a light hung over the *Nordens Dronning's* stern. Therefore, although I say there was an infringement of this regulation with regard to what is called the stern light, it is an infringement which could not have any effect upon the question of collision. Neither in respect of the green light or of the stern light can I find the *Nordens Dronning* to blame.

Now let me consider the other matters. I am asked to believe, and, as I have said, this is an important point, that the tug had only one masthead light. [The learned judge examined the evidence as to this point, and found that the tug had two sufficient masthead lights at the time, and that they ought to have been seen by those on the *Fire Queen*.]

There is one other matter as to which I desire to say a word. The night was hazy; had it not been hazy, the steamer *Fire Queen* certainly might have seen the one masthead light, which she admits was on the tug, at a very much greater distance than 400 or 500 yards. It was hazy, and it may be that that justifies the look-out; but the weather being hazy, and going down, as the captain must have been aware he was, at something like seven knots an hour, he saw a light, one point only, on his port bow, and 500 or 600 yards off. He could not have told for a minute what that light was; he came to the conclusion that it was a vessel at anchor, and acted accordingly. It turned out to be a vessel under way, namely, the tug. I must say that, having regard to the state of weather and the pace he was going, and to the uncertainty there was with regard to that light, in common prudence he should at once have eased his engines. He did not stop at all, but he went on until he got other indications, and he got into the difficulty with which we have to deal.

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On the whole, I come to the conclusion that there must be a decree that the *Fire Queen* is alone to blame.

Solicitors for plaintiffs: *Stokes, Saunders, & Stokes, for Bateson & Co., Liverpool.*

Solicitors for defendants: *H. C. Duncan, Liverpool.*

E. S. R.

May 23.

THE SUTHERLAND.

Compulsory Pilotage—Exemption—London District—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 379.

By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 379, sub-s. 3, the following ships when not carrying passengers shall be exempted from compulsory pilotage in the London district—that is to say, ships trading to Boulogne, or to any place in Europe north of Boulogne.

A vessel while on a voyage from Liverpool to Hamburg was obliged by an accident to put into the Thames for repairs:—

Held, that she was exempted by s. 379 from taking a pilot in the London district.

APPEAL from a judgment of the judge of the City of London Court, whereby he held that the owners of the *Sutherland* were exempt from liability in an action of damage by collision on the ground that the *Sutherland* at the time of the collision was in charge of a pilot by compulsion of law.

The *Sutherland* belonged to the port of Liverpool, and left it on a voyage to Hamburg. While off the *Royal Sovereign* light-ship she came into collision with another vessel, and was so seriously injured as to be obliged to make for the Thames. At Gravesend a Thames pilot was taken on board, in charge of whom she proceeded up the river. In the course of her passage up the river she came into collision with the plaintiff's vessel, the *Kate*. The *Sutherland* went into dock for repairs, discharged her cargo, part of which was taken on by another vessel to Hamburg. After being repaired, the *Sutherland* proceeded with the remainder of her cargo to Hamburg. It was admitted that the collision was caused by the fault of the pilot of the *Sutherland*, and the sole question was whether the employment of such pilot was com-

pulsory, a question which mainly turned on the construction to be put on the Merchant Shipping Act, 1854, s. 379, sub-s. 3. (1)

Myburgh, Q.C., and *Pyke*, for the plaintiffs. The decision of the learned judge of the City of London Court was wrong, for the *Sutherland* was not compelled to take a pilot. Her voyage was directly within the exception contained in s. 379, sub-s. 3, as she was trading to a place north of Boulogne. The vessel was in distress, and London must, therefore, be treated as a port of distress, and not as her port of destination.

Bruce, Q.C., and *Raikes*, for the defendants. The *Sutherland* is not within the exception, which refers only to vessels trading to or from London. The fact that she discharged part of her cargo at London is a ground for including her within another class of vessels to which the exception in the statute does not apply. The sub-section refers only to vessels which at the actual time are vessels trading to a port north of Boulogne, which the *Sutherland* was not doing.

Myburgh, Q.C., was not called on to reply.

THE PRESIDENT. In deciding this case we have nothing to do with the policy of the law, we have only to see what intention is expressed by the words which the legislature has employed. The first question which we have to consider is, whether or not the exemption applies to any other vessels than those which start from or are proceeding to the London district, or one of the Trinity House outport districts. In considering this question, no section of the Merchant Shipping Acts has been referred to which leads to the conclusion that any limit is to be put on the general words of the section, and when the language of the several sub-sections is considered, it is impossible that the description contended for by the defendants can be correct. The words under discussion are: "The following ships, when not carrying passengers, shall be exempted from compulsory pilotage in the London district, and in the Trinity House outport

(1) 17 & 18 Vict. c. 104, s. 379: "The following ships, when not carrying passengers, shall be exempted from compulsory pilotage in the London district, and in the Trinity House outport districts; (that is to say), (3) ships trading to Boulogne, or to any place in Europe north of Boulogne."

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Sir J. Hannen.

districts." The reference to the London district and the Trinity House outports is for the purpose of stating to what compulsory pilotage vessels are not to be subject. When we have to determine the class of vessels which is to be exempt from compulsory pilotage, we find them to be thus described: "Ships employed in the coasting trade of the United Kingdom." That obviously means ships proceeding on a coasting voyage from any one port of the United Kingdom to another. It cannot be restricted to vessels coming out or going into the London district, or the Trinity House outport districts. Then there are the words, "Ships trading to Boulogne, or any place in Europe north of Boulogne." We see no reason for putting any restriction on these general words, which we cannot put on the preceding sub-section. It is unnecessary to determine whether or not this applies to foreign vessels. For we are now dealing with an English vessel, which was proceeding from a port in England to a port in Europe north of Boulogne, and so far this ship seems to us to fall directly within those words. If we speculate on the object which the legislature may be supposed to have had in view in framing this enactment, it would seem that their idea was to give certain privileges to those engaged in particular ways, such as those engaged in the coasting trade. Those vessels which were in the habit of trading to some place in the north of Europe were intended to be in some measure exempt, in the same way as those bringing stone, the produce of the Channel Islands, were by a following sub-section also exempted.

The question, therefore, arises, was this vessel trading to a place north of Boulogne? That she was doing so originally is beyond dispute, and therefore we have to consider if she had ceased to be a vessel so trading. The *Sutherland* met with an accident off Dungeness. Can it be said that the moment the captain saw that it was necessary that some repairs should be done to his ship, she ceased to be a vessel trading to Hamburg? It appears to me that no accident which could happen to her could cause her to lose her particular trading character. That is the only essential character which the legislature requires. I agree that because a vessel is generally engaged in trading to a port north of Boulogne, she would not be exempt if she were not

at the time on a voyage of this character, but if a vessel is obliged for a temporary purpose to put into a port, she does not, on that account, cease to be so engaged. Nor can it make any difference whether the port or harbour in which she may take refuge is a long one, like the port of London, or one of very limited area. I base my decision on the generality of the language of the Act, and hold that as the *Sutherland* was, in my opinion, trading to a place north of Boulogne, she was not bound to take a pilot. The decision of the learned judge must be reversed.

BUTT, J. I am of the same opinion. This is a penal section, for not taking a pilot if he was bound to do so the master could have been brought before a magistrate, we must, therefore, construe these words strictly. I have no doubt that this vessel was at the time in question a ship trading to a port north of Boulogne, and that her voyage was only temporarily interrupted by putting into the Thames. I agree, therefore, in thinking that this appeal must be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Parker, Garrett, & Parker.*

E. S. R.

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June 20.

[IN THE COURT OF APPEAL.]

THE SARA.

Disbursements—Maritime Lien—Liability of Master—Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 10—*Admiralty Court Act*, 1840 (3 *&* 4 *Vict. c.* 65), *s.* 6—*Merchant Shipping Act*, 1854 (17 *&* 18 *Vict. c.* 104), *s.* 191.

Under the Admiralty Court Act, 1861, s. 10, and the Merchant Shipping Act, 1854, s. 191, the master has a maritime lien on the ship for disbursements. *The Mary Ann* (Law Rep. 1 A. & E. 8) and *The Glentanner* (Swa. 415) approved.

A master who has incurred liabilities in respect of necessaries for the ship can maintain an action in rem for "disbursements," though he has made no payment in respect of such liabilities at the time the action is brought. *The Feronia* (Law Rep. 2 A. & E. 65) and *The Fairport* (8 P. D. 48) approved; *The Chieftain* (Br. & L. 104) and *The Edwin* (Br. & L. 281) overruled.

Appeal from a judgment of Butt, J., in an action in rem by the master of the *Sara* for disbursements. The owners of that vessel did not appear, and the action was defended by mortgagees.

It appeared that the plaintiff had drawn a bill at St. Vincent for certain necessary disbursements on the owners of the *Sara*, which was dishonoured, and on which the plaintiff was liable. At the time of the action judgment had not been recovered against the plaintiff by the holders of the bill.

The first defence to the action was that the plaintiff was not entitled to recover, on the ground that those who had supplied the necessaries were the real plaintiffs, and the plaintiff himself was only under a liability on the bill. The second defence was that the plaintiff had no maritime lien for disbursements.

At the trial Butt, J., decided both points in favour of the plaintiff, holding that the plaintiff, being under a liability in respect of the bill, could sue as for actual disbursements; and that on the second point the plaintiff was entitled to succeed on the authority of *The Mary Ann* (1) and *The Ringdove*. (2)

The defendants appealed.

Finlay, Q.C., and *Nelson*, for the defendants. A liability in respect of necessaries does not give a master a right to sue for

(1) Law Rep. 1 A. & E. 8. (2) 11 P. D. 120.

disbursements: *The Chieftain* (1); *The Edwin* (2). The practice has been opposed to these two decisions, and is in accordance with the law laid down in *The Feronia* (3) and *The Fairport.* (4) But those cases were wrongly decided, and cannot be supported in this Court, for if the doctrine laid down in them is correct the master is a mere trustee for those who have supplied necessaries. Secondly, there is no maritime lien for disbursements. The learned judge considered that he was bound by *The Ringdove.* (5) In that case Sir James Hannen followed *The Mary Ann* (6), as he did not wish to alter the practice, which had been long established, though he did not approve of the reasoning on which it was based. The Court of Appeal will overrule *The Mary Ann* (6) if it was wrongly decided. It was decided on s. 10 of the Admiralty Court Act, 1861 (7); that section gives a jurisdiction to the Admiralty Court, but does not give a maritime lien to a master. It has been held by this Court and the House of Lords, in the *Heinrich Bjorn* (8), that under the Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), s. 6, there is no lien for necessaries. The words in this section and in s. 10 of the Admiralty Court Act, 1860, are the same, and *The Heinrich Bjorn* (8) in effect overrules *The Mary Ann.* (6)

Sir W. Phillimore, (*Barnes*, with him), for the plaintiff. *The Heinrich Bjorn* (8) has no application to this case, for the decision of Dr. Lushington in *The Mary Ann* (6) was based, not merely on the words of s. 10, but upon the rights conferred on shipmasters by previous Acts, viz. 7 & 8 Vict. c. 112, s. 16, and 17 & 18 Vict. c. 104, s. 191 (9), as well as on the case of *The*

(1) Br. & L. 104.

(2) Br. & L. 281.

(3) Law Rep. 2 A. & E. 65.

(4) 8 P. D. 48.

(5) 11 P. D. 120.

(6) Law Rep. 1 A. & E. 8.

(7) 24 Vict. c. 10, s. 10: "The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship."

(8) 10 P. D. 44; 11 App. Cas. 270.

(9) Sect. 191: "Every master of a ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages which by this Act or any law or custom any seaman not being a master has for the recovery of his wages; and if in any proceeding in any Court of Admiralty or Vice-Admiralty touching the claim of a master to wages,

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Glentanner. (1) *The Mary Ann* (2) was approved in *The Two Ellens* (3) and followed in *The Edward Oliver* (4); *The Feronia* (5); *The Red Rose* (6); *The Marco Polo* (7); *The Limerick* (8); *In re Rio Grande do Sul Co., Limited* (9); *The Fairport*. (10)

[He also referred to *The Rio Tinto*. (11)]

[He was stopped by the Court on the first point.]

Nelson, in reply.

LORD ESHER, M.R. This is an action by the master of a vessel against the ship for disbursements. It is alleged that he had obtained necessaries for the ship, and in respect of them had drawn a bill of exchange upon the owners of the vessel, by whom it was accepted. This bill was dishonoured before the present action was begun. It is true that the plaintiff has not paid the bill, but it is clear that he is liable to those in whose favour it was drawn. He has in consequence brought this action, in which the mortgagees of the ship have intervened, and they allege that whatever right the master has against his owners, he has no right as against them. This raises the question whether the intervener's mortgage is to be postponed to the master's claim, or in other words whether the master has a lien on the ship in priority to the claim of the mortgagees. Now the only lien he can have is a maritime lien, because he has not possession of the ship, and so the question arises whether the master of a ship has a maritime lien for disbursements.

The first point made against the master's claim in this case is that he has not made any disbursements, because he has not paid anything in respect of his liability on the bill of exchange. If it be a true proposition that in order to have a right of action for

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any right of set-off or counter-claim is set up, it shall be lawful for such Court to enter into or adjudicate upon all questions, and to settle all accounts then arising or outstanding and unsettled between the parties to the proceedings, and to direct payment of any balance which is found to be due.

(1) Sw. 415.
(2) Law Rep. 1 A. & E. 8.
(3) Law Rep. 4 P. C. 161.
(4) Law Rep. 1 A. & E. 379.
(5) Law Rep. 2 A. & E. 65.
(6) Law Rep. 2 A. & E. 80, n.
(7) 1 Asp. Mar. L. C. 54.
(8) 1 P. D. 311.
(9) 5 Ch. D. 282.
(10) 8 P. D. 48.
(11) 9 App. Cas. 356.

disbursements a master must have actually paid money, then even if judgment had been obtained against him on a bill of exchange, it must follow that he could not claim in respect of such disbursements until he had paid the amount of the judgment, because a judgment is not satisfied until the amount for which it is recovered is paid. But it is clear that the plaintiff's liability would, according to the practice of the Admiralty Court, be treated as a disbursement, though money had not been actually paid, since the liability of the plaintiff when the action was begun and the ship was seized being proved, the case is sent to the registrar and merchants, and nothing is done by them until the master has paid.

As regards the first point therefore I have no doubt that the judgment of Butt, J., was perfectly correct.

The second point, whether the master has a maritime lien on the ship for disbursements depends on the construction of the 10th section of the Admiralty Court Act, 1861. It is obvious that this section in terms gives the Admiralty Court jurisdiction over such things as disbursements. But the question is, whether as applied to the particular case of disbursement it also gives the master a lien on the ship which is to be realized by an action in rem. The words introducing the section which gives the jurisdiction, existed in a previous Act of Parliament, and have been dealt with by the Court of Admiralty. There were certain matters over which the Court of Admiralty had jurisdiction, in the sense that there was a maritime lien which the Court could carry into effect by an action in rem. There were certain other matters again over which it had not jurisdiction, until it was given by Act of Parliament. For instance, the Court never had jurisdiction for necessaries supplied to a ship until it was given by the legislature. On the other hand the Admiralty Court always had jurisdiction in respect of a collision at sea, whether the vessels were British or foreign. But if a collision occurred within the body of a county, the Court had no jurisdiction. So with regard to seamen's wages, the Court had a jurisdiction by which it could enforce a lien against the ship for wages in respect of an ordinary maritime contract arising from the signing of the articles. But if there was a special contract the Admiralty Court had no jurisdiction in

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regard to it. The first statute, viz., the Admiralty Court Act, 1840, s. 6, which begins with the words, "The Court of Admiralty shall have jurisdiction" was brought before Dr. Lushington in *The Mary Ann* (1), and he came to the conclusion that though the words gave the Admiralty Court jurisdiction, they did not of themselves give the Court a right to enforce a maritime lien. But that learned judge said also that if these words occurred as the introductory part of a section dealing with a matter in respect of which the Court of Admiralty would under certain circumstances have been able to enforce a maritime lien, and they gave the Admiralty Court jurisdiction to deal with that very same subject-matter under circumstances in which it could not have dealt with it before, then they were to be regarded as taking away the exception, and as placing the matter under the jurisdiction of the Admiralty Court, so that it could enforce a maritime lien without any exception at all. Then the maritime lien would apply to cases which were formerly excepted just as it did to cases which were not excluded.

The Mary Ann (1) decided that disbursements were brought within this principle. Because, as Dr. Lushington said, the Court of Admiralty in some circumstances had jurisdiction to deal with disbursements as carrying a maritime lien. He said that that power in regard to disbursements was given to the Court of Admiralty not by its ancient jurisdiction, but by s. 191 of the Merchant Shipping Act, 1854, which section he held in *The Glentanner* (2), gave a maritime lien to the master under certain circumstances for disbursements. That decision has been challenged in the present case, but I do not find that any Court has hitherto disapproved of the construction put by Dr. Lushington on the 191st section. I am of opinion that we cannot question that decision, which, as I have shewn, Dr. Lushington used as the ground of his judgment in *The Mary Ann* (1). That judgment appears to me to be sound. I cannot believe—I am referring now to the 6th section of the Act of 1840—that in the case of collisions happening in counties, there was only to be a right of action against the owners. What use would the statute be if it gave the owner the right to go the Court of Admiralty, and

(1) Law Rep. 1 A. & E. 8.

(2) Swa. 415.

then only gave him there a judgment similar to one which he could have obtained in a Court of Common Law? What use, again, was it in the case of a seaman with a special contract to give the Admiralty Court power to construe it and nothing more, when its construction might just as well have been left to the Common Law Courts? It seems to me to be obvious that in these cases it was intended not only to give jurisdiction but also a maritime lien, and also that if *The Glentanner* (1) is right, it follows that *The Mary Ann* (2) is also right. The decision in *The Mary Ann* (2) has not been so strongly doubted by any Court as to oblige us to differ from Dr. Lushington. On the contrary, there is the case of *The Two Ellens* (3), which seems to me to strengthen *The Mary Ann.* (2) It has been contended that the expression of opinion in *The Two Ellens* (3) was a mere dictum; with that argument I am unable to agree, because the judgment of the Privy Council is the deliberate judgment of all the members of the tribunal. Again, *The Heinrich Bjorn* (4), and more especially the judgment of Lord Bramwell, is supposed to throw doubt on *The Mary Ann* (2). But the latter, so far from differing from the distinction drawn by Dr. Lushington, seems to countenance it. For, dealing with the question of collisions, he points out that the meaning of the Act of 1840 could not have been that, if a collision took place two hundred yards beyond the Nore Light there should be a maritime lien, and that if two hundred yards within the light there was to be no maritime lien, but only a personal judgment against the owners of the ship. Lord Bramwell says this would be a strange thing, and therefore he does not object to the doctrine that there would be a maritime lien. Lord Bramwell, it is true, holds that the words "the Admiralty Court shall have jurisdiction" do not give a maritime lien, but he does so because as applied to the subject-matter they cannot be said to take away the exception. Thus he does not, in my opinion, overrule the decision of Dr. Lushington in *The Mary Ann* (2), or object to the reasoning on which it is founded. But there is this also to be noted,—*The Mary Ann* (2) was a very important decision, and was given in 1865. From that time to this it has been followed

(1) Swa. 415.
(2) Law Rep. 1 A. & E. 8.
(3) Law Rep. 4 P. C. 160.
(4) 11 App. Cas. 270.

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over and over again. It was approved, as I think, in *The Edwin* (1), in *The Feronia* (2), in *The Marco Polo* (3), in *The Fairport* (4), and certainly in *The Limerick*. (5) The Court of Appeal followed it in the case of *In re Rio Grande Do Sul Co., Limited*. (6) Sir James Hannen also acted upon it in the recent case of *The Ringdove*. (7) This series of precedents is of importance. It is not the case of an interpretation of an Act of Parliament, which only arises on rare occasions, and on the faith of which men have seldom to act. It is not, again, like the case of *The Bernina* (8), in which we reversed the decision in *Thorogood* v. *Bryan* (9), on the faith of which case no man ever got into or remained out of an omnibus. But *The Mary Ann* (10) is a case upon which mercantile men have acted ever since it was decided; on the faith of it captains have assumed that they have a right safely to incur liability for disbursements, and that they will not, having done so, be at the mercy of insolvent owners who, after such liability has been incurred, have mortgaged their ships. To reverse that decision would go far to justify captains in refusing to order necessaries, which are desirable in the interests of the owner and of every one interested in the ship. It would fetter captains in the exercise of a valuable and useful power. I should hesitate long, therefore, to overrule *The Mary Ann* (10) even if I differed from Dr. Lushington's decision, but the reasoning of the learned judge is satisfactory to my mind, it seems to be sound and clear, and were I called on to decide the point for the first time I should decide it in the same manner. I am of opinion, therefore, that the judgment of Butt, J., must be upheld, and the appeal dismissed with costs.

LINDLEY, L.J. The main question is this case is, whether the plaintiff has a maritime lien on the ship in respect of disbursements. This depends on the construction of the 10th section of the Admiralty Court Act, 1861. A construction was put on that section in 1865 in the case of *The Mary Ann* (10) which has been

(1) Br. & L. 281.
(2) Law Rep. 2 A. & E. 65.
(3) 1 Asp. Mar. L. C. 54.
(4) 8 P. D. 48.
(5) 1 P. D. 411.
(6) 5 Ch. D. 282.
(7) 11 P. D. 120.
(8) 12 P. D. 58.
(9) 8 C. B. 115.
(10) Law Rep. 1 A. & E. 8.

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followed ever since it was decided, it has been referred to as law by text-writers, and is incorporated as part of English maritime law. There is no authority against it; but we are asked to overrule it because the reasoning on which it is based is said to be at variance with the decision of the House of Lords and of this Court in *The Heinrich Bjorn.* (1) In my opinion that is not so; Dr. Lushington shews in his judgment that he bases his judgment on other grounds than are covered by that decision. Therefore I think that this appeal must be dismissed.

LOPES, L.J. In my opinion the cases of *The Glentanner* (2) and *The Mary Ann* (3) are conclusive, unless this Court is prepared to overrule them. After carefully considering them they seem to me to be correct. Therefore I think this appeal cannot succeed.

Solicitors for plaintiffs: *Ingledew, Ince, & Colt.*
Solicitors for defendants: *Lowless & Co.*

E. S. R.

PRYOR *v.* PRYOR AND SHELFORD.

Feb. 15.

Divorce—Variation of Settlements—Bastardising of Issue—Evidence.

On a petition for variation of settlements after a decree for dissolution of marriage by reason of the wife's adultery, where a child had been born between the date of the decree nisi and decree absolute, and fourteen months after the wife had eloped from her husband, the Court refused to transfer funds in settlement to the parties free from the trusts of the settlement, and also refused to order an inquiry into the legitimacy of the child.

A DECREE NISI was pronounced on February 27, 1886, which was made absolute on October 26, 1886, dissolving the marriage between the parties on the ground of the wife's adultery, and the petitioner presented a petition praying for a variation of the settlements executed on the marriage, which were of the usual character, giving the parties a life interest, with provision to the children of the marriage. The petitioner had brought 5000*l.* into settlement, and the respondent 4420*l.* The respondent

(1) 10 P. D. 44; 11 App. Cas. 270. (2) Swa. 415.
(3) Law Rep. 1 A. & E. 8.

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eloped with the co-respondent on May 15, 1885, there being then no issue of the marriage, but on July 20, 1886, fourteen months after the petitioner and the respondent had ceased to cohabit, and three months before the decree was made absolute, the respondent gave birth to a child, and on November 11, 1886, she was married to the co-respondent.

The registrar reported in favour of extinguishing the respondent's interest in the 5000*l.* brought into settlement by the petitioner, and of directing the funds to be held on the same trusts as if the wife were dead. He referred to the Court the question of extinguishing the petitioner's interest in the fund brought into settlement by the respondent, and declined to recommend a transfer of the funds to the parties free from the trusts of the settlement on the ground that the illegitimacy of the respondent's child had not been inquired into.

Errington, for the petitioner, moved the Court to vary the registrar's report by ordering the interest of each party in the fund contributed by the other to be extinguished as if each were dead, and either to order the funds to be transferred to the parties free from the trusts of the settlement, or to refer the report back to the registrar for the purpose of taking evidence as to the child's legitimacy.

THE PRESIDENT. I have no objection to order that the respective interests of the parties in the settlement be extinguished but I cannot do more. There is the interest of the infant to be considered, and I cannot assent to extinguishing the other trusts. The decree was founded on the petitioner's evidence, which is not admissible to bastardise the child. As to taking evidence of the illegitimacy, I must decline to try the question in this way.

Solicitors for petitioner: *Ingram, Harrison & Ingram.*

W. L.

[IN THE COURT OF APPEAL.]

1887
May 11.

IN RE THOMAS HOLLOWAY.
YOUNG *v.* HOLLOWAY.

Probate—Practice—Production of Documents—Professional Privilege—Letters to Solicitor—Interrogatories—Relevancy.

The plaintiff sued to recall probate on the ground that the testator was not of sound mind, and that the will was obtained by the undue influence of the defendants, two of whom were the executors, and the third universal legatee. After the commencement of the action four anonymous letters relating to the matters in dispute were received—two by the plaintiff, one by her solicitor, and another by her counsel in the action :—

Held, by the Court of Appeal, varying the order of Butt, J., that the letters to the plaintiff must be produced, but that the letters to the solicitor and counsel were privileged, for they must be taken to have been sent to them for the purposes of the action and by reason of their being the plaintiff's legal advisers in the action, and the privilege was not lost because they were not sent in consequence of any request by the solicitor and counsel, nor obtained by their exertions.

The plaintiff in the same action delivered interrogatories for the examination of the defendants, asking what sums they had received from the testator by way of payment for services, loan or gift, and whether the universal legatee had since the death of testator made over any and what part of the property to the other defendants. The defendants declined to answer these interrogatories as irrelevant.

Held, affirming the order of Butt, J., that the interrogatories must be answered, the period in the first interrogatory being limited to three years.

THIS was an action by a sister of Thomas Holloway against his executors and his sole legatee to revoke the probate of his will, granted in December, 1883. Under this will G. M. Holloway (formerly G. Martin) and H. D. Holloway (formerly H. Driver) were the executors, and Mary Ann Driver the sole legatee.

The plaintiff alleged that the will, dated October, 11, 1883, was executed when the testator was not of sound mind, and that its execution was obtained by the undue influence of the defendants.

The defendants having obtained an order for an affidavit of documents in the possession of the plaintiff, the plaintiff filed an affidavit setting out a schedule of documents, and objecting to produce the documents in the second part of the schedule " on the ground that they are privileged communications and documents

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between myself and my solicitors and between my solicitors and counsel and various persons therein named, such persons being witnesses in support of my claim, and such communications and documents contain evidence in support thereof, the same having been obtained for the purposes of this action."

In the second part of the schedule was the following entry: "Certain anonymous communications."

The plaintiff having been ordered to make a further and better affidavit deposed as follows:—

"1. The anonymous letters referred to in the second part of the schedule to my affidavit of discovery filed in this matter are fully set out and described in the first part of the schedule to this my affidavit.

"2. I object to produce such letters, as they contain the names of certain persons who will be witnesses on my behalf, and also contain the purport of the evidence which such persons will give, and under these circumstances I submit that I am entitled to claim privilege in respect of the said letters, otherwise the defendants would be inspecting such persons' proofs of evidence. All the letters were received by me after the commencement of this action."

The first part of this schedule was as follows:—

"1. Letter from 'a friend of the late Thomas Holloway,' dated October 26, 1886, addressed to the plaintiff.

"2. Letter from E. E. Dale, dated November 1, 1886, addressed to Mr. Middleton.

"3. Letter from 'a friend of the Young family,' dated November 3, 1886, addressed to C. Cheese.

"4. Letter from ——— to Mrs. Young, inclosing letters for Mr. Thomas Young and Mr. Thomas Hutchings, dated November 8, 1886, signed by 'A friend of the late Thomas Holloway.'"

Butt, J., ordered production of all four letters. The plaintiff appealed.

May 11. *Inderwick, Q.C.*, *Middleton*, and *Lipscombe*, for the plaintiff. The defendants are asking for the production of part of the brief and evidence of the plaintiff. The whole of the letters ought therefore to be privileged; but, at all events, the privilege

must extend to those sent to the solicitor and counsel. These letters were sent with a view to the conduct of the action, and come within the rule as to professional privilege.

Bargrave Deane, for the defendant, was directed by the Court to confine his argument to the letters addressed to the solicitor and counsel.

The privilege extends to only what is "procured" or "obtained" by the solicitor for the purposes of the action. These are the words which occur in the cases, and they apply only to information which the solicitor has obtained by his exertions.

[BOWEN, L.J., referred to *Lyell* v. *Kennedy*. (1)]

The letters are anonymous, and headed "from a friend of the Holloway family." The defendants are therefore as much entitled to see them as the plaintiff is. The witnesses may be witnesses for the defendant as much as for the plaintiff.

[COTTON, L.J. Can you suggest any purpose for which these letters could be sent, except for the purposes of this action?]

No; without knowing what is in the letters no suggestion can be made. The defendants proposed in the Court below that Butt, J., should look at the letters.

[COTTON, L.J. I think it would have been wrong for him to do so.]

The Court looked at the letters in *Bustros* v. *White*. (2)

[COTTON, L.J. I do not think such a course right.]

COTTON, L.J. This case is new in circumstances, and we must see whether it comes within any recognised principle upon which the Court allows professional privilege to protect documents from production. As regards letters 1 and 4, sent from we know not whom to the plaintiff in this action, in my opinion there is no ground for claiming protection for them. The plaintiff must give her opponents the benefit of all information she has obtained, unless she can swear that that information was obtained by her for the purpose of being communicated to her solicitor in order to forward her case in the Probate Court. We know nothing whatever about these letters except the fact that they were sent to her and are relevant to the matters in question in the action,

(1) 9 App. Cas. 81, 86. (2) 1 Q. B. D. 423.

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Cotton, L.J.

there is nothing to shew that they were sent for the purpose of being communicated to her solicitor; and in my opinion no privilege can be claimed for them on the statements contained in the affidavits, which we must presume to state correctly all the facts on which we have to determine whether they are to be privileged. As regards the other two letters which after the commencement of the action were sent to the legal advisers of the plaintiff, one to the solicitor and the other to the counsel in the action, I asked the defendant's counsel whether he could suggest any other proceeding with reference to which these letters could be sent to Mr. Middleton and Mr. Cheese, and he fairly admitted that he could not. That being so, I think the proper assumption is that those letters were sent to Messrs. Middleton and Cheese with reference to this matter, and in consequence of their being employed the one as counsel and the other as solicitor in this matter. Will that protect them? Suppose a solicitor is employed to collect evidence or information for the furtherance or defence of an action, if he asks for information by public advertisement or from any particular person, the information he receives in consequence of that general request or that particular request is privileged, because it is information obtained by him for promoting his client's case, and if that was not privileged it would be impossible to employ a solicitor to obtain the evidence and information necessary to support a case. Now, what is the proper inference here? These are the legal advisers employed in this matter, and we must take it that this was the matter with reference to which these communications were made, and although the solicitor and counsel made no request to these persons to give this information, it must have been given in compliance with a request implied by their position. I think, then, that these communications come—not within the circumstances of any decided case—but within the principle laid down in the cases, that where a solicitor is employed on behalf of his client, the information which he gets in reference to the litigation in which his client is concerned is to be protected. It has been said the solicitor has not obtained it. I think he has, because although there was no actual request by him and no labour was performed by him in obtaining these particular things, still it is

in consequence of his labour and skill in prosecuting the case of his client that these communications are made to him. I think, therefore, that these letters come within the principle under which documents are held privileged, though the circumstances of the case are, so far as I know, entirely new.

LINDLEY, L.J. I am of the same opinion. As to letters 2 and 3 we may properly hold them protected, but as regards 1 and 4 they are letters written to the plaintiff. Now the plaintiff must disclose, to the best of her knowledge, information, and belief, what she knows about the matter, and she cannot protect herself by saying that she has told what she heard to her solicitors: *Manser* v. *Dix.* (1) As to letters 2 and 3, I had some doubt, for this reason, that the affidavits do not state explicitly and in terms that those letters were written and sent for the purposes of, and with reference to, and were confidential communications relating to, this litigation, but I think that, especially after the statement made by the defendant's counsel, the inference may be fairly drawn that they must have been so sent. If we once arrive at that conclusion, then I think the difficulty disappears. I cannot think that the privilege depends on the question whether the solicitor has sought for and taken pains to get the information; the question is, in what character he has got it. Whether he has been put to expense and trouble in getting it cannot affect the question one way or the other, and inferring from the affidavit that which no doubt is the real truth, that these letters were confidential communications to Mr. Cheese and Mr. Middleton with reference to this litigation and for the purpose of it, it appears to me that they fall within the principle enunciated in *Bustros* v. *White* (2) and *Lyell* v. *Kennedy.* (3) The distinction that they are not obtained because they are spontaneously given to the solicitor is too refined, and I am of opinion that these two letters come within the ordinary rule, and ought to be protected.

BOWEN, L.J. I am of the same opinion, but I add a judgment of my own, because we differ to some extent from the opinion of

(1) 1 K. & J. 451, 454. (2) 1 Q. B. D. 423.
(3) 9 App. Cas. 81, 86.

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the learned judge below. As to the two letters sent to the plaintiff herself it is obvious there is no privilege at all. There is no professional privilege in such a case, and no other privilege can be set up or is set up in the present instance. When we come to the two letters sent, one to the counsel in this case and the other to the solicitor, a different point and a more difficult one, arises. The class of documents with which the Court had to deal in *Lyell* v *Kennedy* (1), were a collection made by the solicitor, and were held to be privileged, because the mere fact that they were in the solicitor's collection necessitated the inference that they were the result of the solicitor's labour or skill. These two particular documents do not fall within that principle, and we have to consider whether they have found their way to the hands of the solicitor under such circumstances that a professional privilege attaches. The rule is laid down broadly by Lord Blackburn in the House of Lords in *Lyell* v. *Kennedy* (1) not for the first time, that " The law of England, for the purpose of public policy and protection, has from very early times said that a client may consult a solicitor (I mean a legal agent) for the purposes of his cause, and of litigation which is pending, and that the policy of the law says that in order to encourage free intercourse between him and his solicitor, the client has the privilege of preventing his solicitor from disclosing anything which he gets when so employed, and of preventing its being used against him, although it might otherwise be evidence against him." Now, if the solicitor had got these documents in one sense of the word " got,' that is to say had made inquiries for them and obtained them as the result of inquiries which he had expressly made, there could be no question. What we have to decide in the case before us is whether in the special circumstances of this case those documents were not got by the solicitor within the meaning of that rule. The affidavit here appears to me to be drawn in a way which ought not to be taken as a precedent. If we were to hold the plaintiff strictly to her affidavit, I think the affidavit is defective, but we must deal with the case upon broad principles and must read the affidavits by the light of the admission of the opposite parties, that there is no other cause for which these letters can be

(1) 9 App. Cas. 81.

suggested to have been sent to the solicitor and counsel, except the mere cause that they were the solicitor and counsel at the time in this action. If these letters had reference to the case in which they were solicitor and counsel, and if the true inference is that they were sent to them as such, the affidavit must be treated as if it had stated that inference on oath, which I think would be done if we allowed an adjournment for the purpose. If then we draw that inference upon the affidavit as it stands we have simply to ask ourselves the question whether the fact that a letter was volunteered by a person who wrote and sent it to a solicitor because he was solicitor, and for the purpose of the document being held by him as solicitor, differentiates this from the ordinary case where a solicitor has procured documents in the course of his employment. It appears to me that there is no such difference, and in reality there was as much an invitation to the person who sent these letters as if the solicitor had written to the person and expressly asked for them. His character as solicitor was an indication to the world that all information which was honest, bonâ fide and material for the purposes of the cause might be sent to him, ought to be sent to him, and would be received by him on behalf of his client. Therefore he received those letters confidentially for his client, not for himself or for any other purpose, and I think received them for the very reason that he was professionally employed. Therefore this case falls within the principle laid down by Lord Blackburn in *Lyell* v. *Kennedy* (1), and by many other judges.

Order varied.

The plaintiff delivered interrogatories for the examination of the defendants, three of which were as follows:—

"3. What sums of money have you, and each of you, received from the deceased

"(1.) By way of payment for services rendered?

"(2.) By way of loan?

"(3.) By way of gift?"

Interrogatory 8 asked the defendants whether any and what agreement had in the lifetime of the testator been made between

(1) 9 App. Cas. 81.

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them or some of them as to the division of the property by M. A. Driver on the death of the testator between them or some of them.

"9. Has the defendant M. A. Driver since the death of the deceased made over any of the property which she took under the alleged will to the defendants G. Martin and H. Driver. If so, what was the value of the property so made over to each of them?"

"10. Has the defendant M. A. Driver since the death of the deceased made over any of the property which she took under the alleged will to Celia Oliver, the defendant George Martin's daughter. If so, what was the value of the property so made over to her?"

The defendants answered interrogatory 8, by denying that there was any such agreement as was therein inquired after. They declined to answer 3, 9, and 10 as being irrelevant.

Butt, J., ordered them to answer, limiting interrogatory 3 to moneys received in the years 1880 to 1883, both inclusive. The defendants appealed.

Bargrave Deane, for the defendants. The defendants object to interrogatories 3, 9, and 10, as irrelevant. As to the 3rd it cannot be material on the issue of undue influence whether the testator had made the defendants presents in past years. As to the 9th and 10th, gifts of money by the defendants after the testator's death have no bearing upon the question of undue influence on the testator.

Inderwick, Q.C. for the plaintiff. The result of an answer to interrogatory 3 may be to shew that practically the defendants could get from the testator any sum they chose to ask him for, a fact which would be material on the question of undue influence. Then, as to 9 and 10, undue influence is charged against the three defendants, and if the one who took under the will divided the property among the three shortly after the testator's death, that would tend materially to support the case of a scheme by the three to get the testator to make this will.

COTTON, L.J. These interrogatories have not been answered at all, and the only question we have to consider is whether they are

relevant; if they are, they must be answered. As regards No. 3 the objection was not pressed when we indicated our opinion that the fact that these people had received large sums from the testator during the last years of his life might be material with reference to the rest of the evidence on the question of undue influence, by shewing the control the parties had over him.

Then we come to 9 and 10, and no answer has been given to those. The question is whether after the testator's death the legatee gave large sums of money to the executors and to the daughter of one of the executors. The three are charged with undue influence. The two executors took nothing under the will, and it is conceded that one of the interrogatories, by which it is asked whether there was not an agreement between the legatee and the executors for division of the property, was relevant. That being admitted to be relevant, I cannot see how it can be successfully contended that 9 and 10 are irrelevant, as they are pointed at a division of property which would give rise to a strong inference that there was, if not an agreement, some understanding in the testator's lifetime as to the division of his property. The exercise of undue influence by these two gentlemen is alleged. The argument would be used—what interest had they to exercise it, they take nothing under the will. But if they received a large sum of money from the legatee soon after the testator's death, and the daughter of one of them also received a large sum, that would displace the argument that these gentlemen could have no possible reason for exercising the alleged undue influence. I think, therefore, if 8 is relevant 9 and 10 are, and they are relevant independently of 8 in reference to the question I have suggested. Of course we know nothing about the evidence, but in determining whether answers to interrogatories should be given, we must consider whether the answers given to the plaintiff seeking discovery may not be relevant and assist the plaintiff in completing her evidence. I think that this appeal fails.

LINDLEY, L.J. I agree, and as to 3 I do not think I need say anything, because it appears to me a plain case. Interrogatories 9 and 10 appear to me to be supported by interrogatory 8. If

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the answers to 9 and 10 admitted the giving a large amount of property, that would tend strongly to disprove the denial in the answer to the 8th interrogatory. The defendant denies that there was any such agreement as that interrogatory inquires after, but that denial will be discredited if it turns out that the property has been divided in such a way as to lead strongly to the inference that there was such an agreement. It therefore is impossible to say that interrogatories 9 and 10 are not relevant and material.

BOWEN, L.J. I am of the same opinion. The case sought to be made is one of undue influence against three persons, one only of whom has benefited by the will of the testator. All three being charged with undue influence, it must, in the nature of things, be important to see whether two of the defendants who are charged with undue influence have received from the third defendant, who took all the benefits under the will, a substantial pecuniary benefit out of the testator's property. I think any jury or judge might be materially influenced by that in weighing any evidence there might be to shew that the three defendants had combined to exercise undue influence for the purpose of inducing the testator to make this will.

Appeal dismissed.

Solicitors for plaintiff: *Clement, Cheese, & Green.*
Solicitors for defendants: *Clarkson, Greenwell, & Wyles.*

H. C. J.

[BEFORE A DIVISIONAL COURT—Lord Coleridge, C.J., and Butt, J.]

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May 2, 3;
June 29.

BOSVILE *v.* THE ATTORNEY-GENERAL.
BOSVILE and Others cited.

Legitimacy—Paternity of Child born in Wedlock—Duration of Pregnancy—Presumption of Legitimacy—Evidence to rebut.

The presumption in favour of the legitimacy of a child born in wedlock is not a presumptio juris et de jure but may be rebutted by evidence, which must be clear and conclusive and not resting merely on a balance of probabilities.

In a suit for declaration of legitimacy where a child had been born 276 days after the last opportunity of intercourse between the husband and wife, and where there was evidence in the wife's conduct tending to shew that she regarded the child as the offspring of her paramour, the President directed the jury that it was for them to say whether on the whole of the evidence given on behalf of those who asserted illegitimacy, the conviction had been brought home to their minds that the husband was not the father of the child; and read to them the opinion of Lord Lyndhurst in *Morris* v. *Davies* (5 Cl. & F. 163). The jury found that the child was illegitimate:—

Held, by the Divisional Court, that the direction was right, and that the verdict was not against evidence.

This was a motion to have judgment entered for the plaintiff, or in the alternative for a new trial of a petition presented under the Legitimacy Declaration Act, and tried before the President and a special jury on February 28 and March 2.

The parties were married June 14, 1882, and a daughter was born of the marriage in June, 1883. On June 30, 1884, Mrs. Bosvile eloped with Mr. Augustus William Craven from her husband's house, and never afterwards cohabited with him. Mr. Bosvile instituted a suit for the dissolution of his marriage, and a decree absolute was pronounced dissolving the marriage on February 16, 1886.

Mr. and Mrs. Bosvile occupied the same bedroom up to the day of her elopement, and it was an admitted fact in the case that there had been no access after that date. On April 3, 1885, exactly 277 days (or 276 days counting to the commencement of labour on April 2) after she left her husband, Mrs. Bosvile gave birth to a full grown child whose legitimacy was the question in dispute.

The petition was presented on behalf of this child by his next

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friend, his uncle, and prayed for a declaration that he was the legitimate son of Mr. Thomas Bolle Bosvile. The Attorney General in his reply traversed the allegations in the petition, and Mr. Bosvile, Nelly Marion Bosvile, the infant daughter of the marriage, and Elizabeth Marion J. Willis Bosvile, the former wife of Mr. Bosvile and mother of the petitioner, were cited to see proceedings.

At the hearing of the petition Dr. Barnes, Dr. Priestley, and other medical witnesses were called, who stated that the normal time of gestation is from 270 to 275 days, and that a longer period, though not unknown or even uncommon, is exceptional. Dr. Barnes stated that 280 days is not an uncommon time, but that it is an extreme time; and Dr. Priestley stated that a period exceeding 275 days is somewhat "exceptional but not abnormal, verging towards abnormality but not necessarily so." It also appeared from the evidence of the lady's maid that Mrs. Bosvile was at the commencement of her monthly period on June 29 the day before she left her husband, and according to the medical testimony this fact made strongly against the probability that the child was the result of marital intercourse. One witness expressed the opinion that it almost excluded the idea.

The President in summing-up the case directed the jury as to the law in the following terms:—

"Now, it is to be remembered that in any case of this kind the law prescribes this presumption in the outset, that any child born of a married woman is to be deemed to be the offspring of her husband unless the contrary be shewn. That is, the onus of proof rests upon those who assert that the child born in wedlock is not the legitimate offspring of the two married people. At one time the law of England went very far in support of that presumption, and did not allow a child born of married people to be declared illegitimate unless it was proved to be impossible that the husband should have had access to the wife. Even to so great an extreme did the law go that for many years—hundreds of years, I may say—it was the law that it must be shewn that the man was not in the kingdom, otherwise, if he was in the kingdom, it was to be presumed that the child of his wife was begotten by him.

"But that is not the law now; the law has gradually relaxed those stringent rules; and now a case of this kind is to be determined by a jury, like any other question of fact; and it is for the jury to say whether upon the whole of the evidence given on behalf of those who assert the illegitimacy of the child, it has brought home to their minds the conviction that the husband was not the father of the child.

"Well, there is still another presumption of law which must be called to your attention before we proceed to deal with the particular facts of this case, and that is that if a husband and wife sleep together, and there be no other facts in the case, then it is to be presumed that sexual intercourse takes place between them, and if it were proved to demonstration that at a time when the husband was sleeping with his wife she was carrying on an adulterous intercourse with some other man, so that it would be possible that the child should be the child of either the husband or the paramour, still the presumption is that it is the child of the husband. You will bear in mind, I say, that is where there is nothing else in the case."

And he concluded his summing-up as follows:—"Now, gentlemen, I have gone through the several facts of the case, and the question which I leave to you is this: whether you are convinced by the evidence in the case that this child was not the child of Mr. Bosvile; and my concluding words to you shall be borrowed from the judgment of a very great judge, Lord Lyndhurst, who has dealt with that particular case of which I have mentioned to you some of the salient points. In the case of *Morris* v. *Davies* (1), after stating his view that the conduct of the parties must be taken into consideration for the purpose of repelling the inference of law arising from the relation of husband and wife, he uses this language, which I commend to your attention: 'My Lords, this then is the view I have always taken of the law connected with this subject; at the same time, as I before expressed and I now feel, that presumption of law—which is, that a child born in wedlock is the child of the husband—that presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability; the evidence for the purpose

(1) 5 Cl. & F. 163.

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of repelling it must be strong, distinct, satisfactory and conclusive.' It will be for you to say whether this evidence does establish to your mind conclusively, not by way of conjecture, but by way of conviction, that the child was not begotten by the husband."

The jury found that the infant Arthur Bolle Bosvile was not the son of Mr. Thomas Bolle Bosvile.

Gully, Q.C. (*Ram*, with him), for the petitioner. It is contended that the case ought not to have been left to the jury, or at any rate that they should have been directed that there was an irresistible presumption in favour of the petitioner's legitimacy; and further that the finding of the jury was against the weight of evidence. Where a husband and wife are shewn to have slept together the inference is that connection took place. Here they slept together on the night of June 29, and the birth of the child, according to the medical evidence, is well within the period required for the husband to have been the father of it. There is, therefore, a presumptio juris et de jure that the child was legitimate. Where access is proved, and the parties are actually sleeping together, the inference is irresistible, and should not be left to the jury. Impotency would be a material fact the other way, but to repel the presumption of law it must be shewn that marital intercourse was impossible, either by reason of impotency, or by the positive impossibility of access. It is enough if intercourse was possible, and the status of the child is not to be determined by mere probabilities.

Sir C. Russell Q.C. (*Inderwick, Q.C.*, and *C. A. Middleton*, with him). All the cases cited establish that the presumption in this case is capable of being rebutted. There is no case in which it is suggested that the presumption that a child born in wedlock is the child of the husband is irresistible, and if you can attack the presumption by one class of evidence why should you not attack it by another. It is not a presumptio juris et de jure if a man and his wife sleep together that intercourse takes place, and any child to which the wife gives birth within the natural period must be the child of the husband—for you may shew that the man was impotent. The President therefore was right in leaving the

question in controversy to the jury. He could not have stopped the case, and he could not have used stronger language than he did in warning the jury that they must not disregard the presumption in favour of the legitimacy of the child unless they had such a case put before them as would lead irresistibly to the conviction that it was illegitimate. The question having been properly left to the jury, the Court will not set aside a verdict unless it comes to the conclusion that it was a verdict at which no jury of reasonable men could arrive; but considering the facts in this case, the lady's condition when she left her husband, the medical evidence as to the normal period of gestation, her own letters to her husband, and her concealment of her pregnancy, the jury could come to no other verdict.

Gore, for the Attorney-General, did not address the Court.

[The following authorities were referred to in the course of the arguments on both sides: *Legge* v. *Edmonds* (1); *Head* v. *Head* (2); *Morris* v. *Davies* (3); *Bury* v. *Phillpot* (4); *Plowes* v. *Bossey* (5); *Hawes* v. *Draeger* (6); *Aylesford Peerage Case* (7); Fleta; Introduction to Report on Gardner Peerage, p. 23; Best on Presumptions, pp. 21, 71, 171, ed. 1884.

Cur. adv. vult.

June 29. BUTT, J., delivered the judgment of the Court:—

In this as in other cases of the birth of a child during wedlock, there is, primâ face, a strong presumption in favour of legitimacy.

It is contended on the part of the plaintiff that the facts proved, and not in dispute, establish not merely a strong presumption in favour of the legitimacy of the child, but such a presumption or such presumptions as the law holds incapable of rebuttal, or, in the language of the civilians, præsumptio, or præsumptiones juris et de jure.

There is the highest authority for saying that the presumption in favour of legitimacy may be rebutted by evidence; but counsel on behalf of the plaintiff contend that the admitted facts of this

(1) 25 L. J. (Ch.) N. S. 125.
(2) 1 Sim. & St. 150; T. & R. 138.
(3) 5 Cl. & F. (H. L. C.) 163.
(4) 2 My. & K. 349.
(5) 31 L. J. (Ch.) 681.
(6) 23 Ch. D. 173.
(7) 11 App. Cas. 1.

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case preclude such evidence. If we rightly understand their argument, it is this: From the admitted fact of the husband and wife having occupied the same bedroom on the night of June 29–30, and of the wife having given birth to a child on April 3, following, the period between those dates being a not impossible period of gestation, a presumption, absolute and incapable of rebuttal, arises, that marital intercourse between the husband and wife occurred on June 29 or 30, and that the fact of marital intercourse being so established, another presumption, equally absolute and irrebuttable, ensues, viz. that the child born on April 3 was the result of that intercourse.

It is not clear to us that, having regard to all the circumstances of this case, any such presumption arises. We certainly know of no authority for saying that such presumptions of law may be cumulative, i.e. that a presumption based, not on facts established by direct proof, but on another presumption of the same nature, is incapable of rebuttal by evidence.

The decision of the House of Lords in the case of *Morris* v. *Davies* (1) appears to us sufficient to support the proposition that the presumption in favour of the legitimacy of a child born in wedlock may be negatived by evidence. In the more recent case of the *Aylesford Peerage* (2) Lord Blackburn said: "The case of *Morris* v. *Davies*, a decision of this House, decides what, upon the balance of authority without that decision, I should have no hesitation in deciding, that such a presumption can be rebutted, and it also shews that it can be rebutted by the conduct of the parties, taking the whole res gestæ, raising a strong and irreistible conclusion that the child born was not the child of the husband, but the child of another."

That being the law on the subject, it is impossible to say that there was misdirection on the part of the learned judge who tried this case, for he read and commended to the jury the following passage from Lord Lyndhurst's opinion in the case of *Morris* v. *Davies* (1): "My Lords, this then is the view I have always taken of the law connected with this subject, at the same time, as I before expressed, and I now feel, that presumption of law—which is that a child born in wedlock is the child of the

(1) 5 Cl. & F. (H. L. C.) 163. (2) 11 App. Cas. 1.

husband—that presumption of law is not to be lightly repelled. It is not to be broken in upon or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive." The learned judge added: "It will be for you to say whether this evidence does establish to your mind, conclusively, not by way of conjecture, but by way of conviction, that the child was not the child begotten by the husband."

The direction to the jury being right, it remains to consider whether the verdict ought to be set aside as against the weight of evidence.

Now we agree with the argument that it is not a case in which the jury would be justified in finding against the legitimacy of the child on a mere balance of probabilities. In order to support such a verdict there must be a strongly preponderating body of evidence making against the presumption of legitimacy.

The jury under proper direction must be taken to have found that such evidence exists in the present case.

In support of the view they took the following facts were established:—

The ordinary period of gestation is 270 to 275 days; anything beyond is exceptional. The child was born 276 or 277 days after the last opportunity of intercourse between the husband and wife, and at the time when that opportunity occurred the wife's periodical menstruation had begun, a circumstance that makes marital intercourse on that day, to say the least, improbable. Reckoning backwards from the birth of the child, on each of the days from 270 to 275, both inclusive, the lady slept with Mr. Craven, and not with her husband.

Menstruation was certainly going on at the time the lady left her husband, on June 30. That is a fact which, in the opinion of the medical men examined on the part of the defendant (and there were none called on behalf of the plaintiff), makes strongly against the probability of the child being the husband's. One of the witnesses, Dr. Barnes, said "it would almost exclude the idea."

Moreover, the lady herself seems to have regarded the child as the child of Mr. Craven, and not of her husband. The time

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fixed by her for the attendance of the monthly nurse was obviously based on a calculation which placed the commencement of the period of gestation subsequent to the day on which she left her husband's house, from which day she was living in adultery with Craven. And in her letters to her husband, written in September, 1884, and March, 1885, Mrs. Bosvile not only refrains from suggesting that the child with which she was pregnant was his child, but does not even mention the fact of her pregnancy, although she is imploring forgiveness and asking pecuniary assistance.

Under these circumstances we are not prepared to say that the jury were wrong in regarding the evidence against the legitimacy of the child as conclusive.

The present application must therefore be refused.

Middleton, on behalf of Mr. Bosvile, applied for costs against the petitioner, but the Court refused under the circumstances to make any order as to costs.

Solicitors for petitioner and Mrs. Bosvile: *Gedge, Kirby, & Millett.*

Solicitors for Attorney-General: *Gregory & Co.*

Solicitors for Mr. Bosvile and others: *Collyer-Bristow & Co.*

W. L.

THE VIVIENNE.

1887
July 12.

Co-ownership—Restraint—Bail for Safe Return—Release of Sureties—24 Vict. c. 10, s. 8.

In an action of restraint two sureties executed a bail bond for the safe return of the ship. No time was fixed in the bond at which the liability of the sureties should cease. After the bond had been in existence for nearly three years, and when the vessel was in this country, and the owners of the majority of shares were changed, the sureties applied to be released from the bond:—

Held, that the application was reasonable, and the bond was ordered to be cancelled.

MOTION for the release of the sureties to a bail bond and for the cancellation of the bond.

An action of restraint was commenced by the minority of co-owners of the *Vivienne* on August 14, 1885, and in October, 1885, the majority gave bail for the safe return of the vessel. In the bond it was not stated that bail was given until the arrival of the *Vivienne* in this country at the end of any particular voyage, or by any particular date. But the sureties made themselves liable if the vessel should not safely return to a port within the jurisdiction from as many voyages as she should sail upon before notice should have been given to the defendants by the plaintiffs that they withdrew their claim for security. The duration of time for which the bond was to continue in force was thus left indefinite. At the date of the hearing of the present application the owners of the majority of shares were no longer the same as when the bail bond was entered into, and the managers of the vessel were also not the same. The vessel was at Cardiff, loading for an outward voyage.

Barnes, for the sureties. The sureties executed this bond at the request of and on behalf of the owners of the majority of shares at the time when the bond was given. They have no relations with the present part owners, and it is inequitable that they should remain sureties for persons on whose account they did not originally become sureties.

Aspinall, for the plaintiffs. No term is fixed for the duration of the bond. It would be unjust to the plaintiffs that they should

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lose the benefit of an instrument which is clear in its terms, and valid, irrespective of any change of ownership on the part of the majority.

BUTT, J. I think it would be unreasonable to keep the sureties to this bond under a liability in perpetuity. It could not have been in their contemplation to undertake so indefinite a liability, and on behalf of others than those by whom they were requested to be parties to this bond. I shall therefore order the sureties to be released, and the bond cancelled on such terms as will be fair to the plaintiffs.

After a discussion of the terms of the decree, Butt, J., ordered it to be drawn up as follows:—The judge having heard counsel on both sides, ordered that the bail bond filed in this action on October 27, 1885, be cancelled in three days, unless the steamship *Vivienne* shall have passed out of the jurisdiction of the Court, before she be arrested by a further warrant; otherwise the bond to remain in force until the return of the vessel from her next voyage. Further, that if the bond be cancelled, defendants pay the costs of this motion; otherwise the said costs to be reserved, and that either party be at liberty to apply.

Solicitors for the plaintiffs: *Clarkson, Greenwell, & Wyles.*
Solicitors for the sureties: *T. Cooper & Co.*

E. S. R.

THE CARGO ex LAERTES.

1887
June 18, 25.

Salvage—Salved and salving Vessels belonging to same Owners—Bill of Lading —Exceptions qualifying implied Warranty of Seaworthiness.

A steamship became disabled at sea owing to the breaking of her fly-wheel shaft, through a flaw in the welding existing at the commencement of the voyage, but not discoverable by the exercise of any reasonable care.

The cargo on board her was shipped under three bills of lading, the first of which contained, amongst other excepted perils, the clause:—"warranted seaworthy only so far as ordinary care can provide"; the second: "warranted seaworthy only as far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers, and crew can ensure it;" and the third: "owners not to be liable for loss, detention, or damage . . . if arising directly or indirectly . . . from latent defects in boilers, machinery, or any part of the vessel in which steam is used, even existing at time of shipment, provided all reasonable means have been taken to secure efficiency."

A vessel belonging to the same owners towed the disabled vessel to a place of safety.

In an action of salvage brought by the owners, master and crew of the salving vessel against the owners of cargo in the salved vessel:—

Held, that the owners of the salving vessel (though at the same time owners of the salved vessel) were entitled to salvage, and that the owners of the cargo had no remedy for breach of the contract of carriage, for the exceptions in the bills of lading were such as to constitute a limited warranty of seaworthiness at the commencement of the voyage, which limited warranty had been complied with by the shipowners.

ACTION OF SALVAGE.

The plaintiffs were the owners, master and crew of the *Achilles*, a screw steamship of 2359 tons gross and 1529 tons nett register, with engines of 300 horse-power nominal, and, at the time of the salvage services, on a voyage from Singapore to Cochin on the west coast of India, with about 2000 tons of general cargo, and manned by a crew of forty-six hands all told, with fourteen passengers. Her value was £15,000, cargo £84,000, freight £3300.

The owners of the *Achilles* were also owners of the *Laertes*, a screw steamship of 2148 tons gross and 1391 tons nett register, with engines of 300 horse-power nominal, and, at the time in question, on a voyage from Shanghai and other ports to Amsterdam, having a crew of forty-one hands all told, with six passengers. Her value was £20,000, freight £5600, and she was laden with a cargo, chiefly tobacco, valued at over £120,000.

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The defendants were the owners of a portion of the cargo on board the *Laertes*, of the value of £116,400, and this part of the cargo was shipped under three different forms of bills of lading, the exceptions in which, so far as material, were respectively as follows:—

(1.) "warranted seaworthy only so far as ordinary care can provide."

(2.) "warranted seaworthy only as far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers, and crew can ensure it."

(3.) "owners not to be liable for loss, detention, or damage . . . if arising directly or indirectly . . . from latent defects in boilers, machinery, or any part of the vessel in which steam is used, even existing at time of shipment, provided all reasonable means have been taken to secure efficiency."

On March 10, 1887, the *Laertes* became disabled by reason of the fly-wheel shaft breaking through a flaw in the welding. On March 12, in lat. 5.51 N. and long. 90.50 E. the *Laertes* was picked up by the *Achilles*, and towed, in three days and twenty-two and half hours, to Colombo, a distance of about 720 miles, the weather being fine throughout, and no danger to either of the vessels or their crews, except the risk to which the *Laertes* was exposed, if left to herself, of being overtaken by bad weather with only her sails to depend upon.

June 18. From the evidence it appeared that the flaw in the welding of the shaft of the *Laertes* was a latent defect, which existed at the commencement of the voyage, but was not discoverable by any reasonable care.

Cohen, Q.C., and *Barnes*, for the plaintiffs. It is admitted that, as against the cargo on board the *Laertes*, the master and crew of the *Achilles* are entitled to salvage; the owners of the *Achilles* are also entitled to rank as salvors, because in the first place, by the master and crew of, and by their vessel, the *Achilles*, they rescued the cargo of the *Laertes* from a position of danger, and, as owners of the *Laertes*, they were not bound, under their contract to carry the defendants' goods, to employ the master

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and crew of the *Achilles* to salve those goods. In the second place, the salvage reward cannot be denied them on the ground that, as owners of the *Laertes*, they have broken their contract to carry, and are therefore liable to repay to the cargo owners, by way of damages, any sum that may be, by way of salvage, awarded to them as owners of the *Achilles* or to the master and crew of that vessel, for the breaking of the shaft of the *Laertes* through a latent defect existing at the time of shipment was an excepted peril in the bills of lading, these exceptions taking the case out of *The Glenfruin* (1), and substituting for the implied warranty of seaworthiness at the commencement of the voyage an express obligation by contract, which obligation the owners of the *Laertes* have discharged, in that they provided a vessel as seaworthy at the commencement of the voyage as reasonable care could make her.

[They referred to *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company* (2); *Gibson* v. *Small* (3); *Worms* v. *Story* (4); *The Rona* (5).]

Myburgh, Q.C., and *Raikes*, for the defendants. This case is concluded by the *Glenfruin* (1), for the defect in the welding of the shaft of the *Laertes* rendered her unseaworthy, and between ship and cargo-owner the implied warranty of seaworthiness at the commencement of the voyage is absolute, nor do the exceptions relied upon by the plaintiffs exonerate them, for the rule of construction applied to bills of lading is that all the perils which are excepted are perils subsequent to the loading of the cargo: *Steel* v. *State Line Steam Navigation Co.* (6)

The claim to salvage by the owners of the *Achilles* should, in order to avoid circuity of action, be dismissed, for any amount awarded to them, or to their master and crew, would, as they are also the owners of the *Laertes*, be recoverable against them as damages for breach of their contract to carry.

Cohen, Q.C., in reply.

June 25. BUTT, J. (After stating the facts of the case above set out, continued:—) The salvage service was one rendered in

(1) 10 P. D. 103.
(2) 10 Q. B. D. 521.
(3) 4 H. L. C. 353.
(4) 11 Ex. 427.
(5) 51 L. T. 28.
(6) 3 App. Cas. 72.

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Butt, J.

fine weather. There was little or no danger to the salvors or their ship, and no immediate danger to the cargo on board the salved ship, though as the *Laertes* had broken down, if she had been left to her own resources, serious danger might have followed. It is said that the owners of the *Achilles* being also the owners of the *Laertes* should, in order to avoid circuity of action, be held barred from recovering salvage in this suit, because having undertaken to carry the cargo on board the *Laertes* to its destination, and the vessel having broken down, if they recovered salvage from the owners of the cargo, they would be immediately liable to an action to recover back the same amount for breach of their contract to carry. The whole case therefore resolves itself into the question whether the owners of the *Laertes* have been guilty of a breach of contract for which they would be liable to the cargo-owners? No doubt the ordinary rule is, that, at the commencement of the voyage, there is an implied warranty that the ship is seaworthy, not that the owner will use his best endeavours to make her so, but that she is in fact seaworthy. The *Laertes* broke down from a latent defect, which I find as a fact could not have been discovered by the exercise of any reasonable care on the part of the owners, but the flaw in the shafting which led to the break-down existed when the ship started, and therefore she was not seaworthy for the voyage. If the implied warranty existed, or was not limited by the contract in the bills of lading, then the owners of the *Laertes*, being also the owners of the *Achilles*, could not sue as salvors. The cargo was shipped under three different bills of lading, and it is said on the part of the defendants, that the stipulations in these bills of lading had no effect whatever in limiting the warranty of seaworthiness. Mr. Myburgh contended that the exception (above set out) in the first bill of lading, only amounted to a stipulation that the ship-owner would keep his vessel seaworthy during the voyage, but I think the words apply, and were intended to apply, as a limitation of the original implied warranty, and that they do in fact, for present purposes, abrogate the warranty which would otherwise be implied. I cannot follow Mr. Myburgh in his view that the exception (above set out) in the second bill of lading is only limited to the period subsequent to the loading, and I think the

exception (above set out) in the third bill of lading, if it does not abrogate, at all events limits, the warranty which the law would otherwise imply that the ship was seaworthy at the beginning of the voyage. The decision in the case of *Steel* v. *State Line Steam Navigation Co.* (1) was that, under ordinary circumstances, the stipulations in a bill of lading apply after the warranty of seaworthiness has come into effect. In the bills of lading which were before their Lordships in that case there were no such stipulations as in this case, and I am not departing from the decision in that case in holding, as I do, that the clauses in these bills of lading limit the implied warranty of seaworthiness.

With regard to the facts which must be established in order to give effect to the limitations in these bills of lading, I find as a fact:—(1.) that the vessel was seaworthy as far as ordinary care could make her so; (2.) that the vessel was seaworthy as far as due care in the appointment and selection of agents, superintendents, pilots, masters, officers, engineers, and crew, could ensure it; (3.) that the accident occurred from a latent defect in her machinery existing at the time of shipment, though all reasonable means had been taken to secure efficiency.

It follows from this that there is no reason why the plaintiffs should not recover salvage from the owners of the cargo on board the *Laertes*. The Court is always reluctant to make a large award against cargo when the claim is made by the owners of the ship itself, but, having regard to all the circumstances of the case, and looking to the size of both ships, and bearing in mind that the portion of the salved cargo proceeded against is valued at £116,400, I award £1200, and, as I am asked to apportion, £50 of this will go to the master, £250 to the crew, and the remainder to the owners.

Solicitors for plaintiffs: *Pritchard & Sons, for Thornely & Cameron, Liverpool.*

Solicitors for defendants: *Waltons, Bubb, & Johnson.*

(1) 3 App. Cas. 72.

E. S. R.

1887
May 11.

[IN THE COURT OF APPEAL.]

APTHORPE *v.* APTHORPE.

Divorce—Navy—Pay of Surgeon—Order for Attachment—Costs.

The pay of a surgeon in Her Majesty's navy who is in active service cannot be assigned, and therefore cannot be attached for costs.

Decision of Butt, J., affirmed.

APPEAL from a decision of Butt, J., refusing an application to attach the respondent's pay for costs due to the petitioner.

It appeared that the petition was by a wife for restitution of conjugal rights, and was dismissed, the question of costs being reserved. On March 15, 1887, an order was made for the respondent to pay to the solicitors of the petitioner 43*l.* 3*s.* 2*d.*, the amount of her taxed costs. The respondent was a surgeon in the Royal Navy, his rank being equal to that of a lieutenant, and he was on board one of Her Majesty's ships in the West Indies as surgeon. An application having been made to attach the respondent's pay for these costs, Butt, J., dismissed the application, and the petitioner appealed.

Bargrave Deane, for the petitioner. The learned judge was of opinion that s. 141 of the Army Act, 1881 (44 & 45 Vict. c. 58), ought to be followed by analogy in the present case, but that section relates only to deferred pay, pensions, and prize money. The statute 28 & 29 Vict. c. 73, s. 5, does not affect the case, for it is confined to subordinate officers, seamen, and marines. There is no statutory prohibition of an assignment of the pay of a commissioned officer in the navy, nor can any case be found shewing it to be illegal. *Lucas* v. *Harris* (1) relates to pensions, and went on the construction of 44 & 45 Vict. c. 58, s. 141.

[BOWEN, L.J., referred to *Barwick* v. *Reade*. (2)]

Searle, for the respondent, was not called upon.

COTTON, L.J. This is an appeal from the refusal of Butt, J., to attach the pay of a surgeon in the navy. It is said that such

(1) 18 Q. B. D. 127. (2) 1 H. Bl. 627.

pay is not protected by any statutory enactment, and that appears to be the case. But I am of opinion that it is protected by the general law. For what purpose is pay given to an officer in Her Majesty's service? To enable him to discharge his duties. It was decided in *Flarty* v. *Odlum* (1) that half-pay cannot be assigned. Now if half-pay, which is granted to a man in order to keep him in a state to perform his duties if called upon to discharge them, cannot be assigned, then, à fortiori, pay which is given him to enable him to discharge his duties in præsenti cannot be assigned, and if it cannot be assigned it cannot be attached.

LINDLEY, L.J. I am surprised at this appeal. It has always been taken for granted that the full pay of an officer on service cannot be assigned, the only doubt has been as to half-pay.

BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors for appellant: *Langlois & Biden.*
Solicitors for respondent: *Bramall & White.*

H. C. J.

MOORE *v.* MOORE, CHADWICK & GRIFFITHS. *July* 16, 26.

Divorce—Husband's Petition—Plea of Desertion set up by Wife—Deed of Separation—No Covenant not to sue or to condone—Judicial Separation.

In a suit by the husband for dissolution on the ground of his wife's adultery the wife in her answer made a counter-charge of desertion, and prayed for a judicial separation.

It appeared that the husband left his wife in November, 1884, and in January, 1887, a deed was executed by which the wife agreed to live apart from her husband, but there was no covenant not to sue and no agreement to condone past offences.

The jury found all the issues in favour of the wife:—

Held, that the deed was not a bar to the wife's remedy, and that she was entitled to a decree of judicial separation.

THIS was a husband's petition for divorce on the ground of his wife's adultery.

The parties were married on November 14, 1866, and lived

(1) 3 T. R. 681.

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together until November, 1884, when the husband left his wife and had never since cohabited with her. There had been six children of the marriage.

On January 5, 1887, a deed was executed by which the parties agreed to live apart, the husband allowing the wife 2*l.* 10*s.* per month for her maintenance "as long as the separation continued," and the wife agreeing to "refrain from all annoyance, importunity and molestation," and further, to maintain herself out of her allowance and her own earnings without seeking to pledge the husband's credit. She further agreed not to take any of the children out of the husband's custody.

On April 27, 1887, the husband filed a petition praying for a dissolution of his marriage on the ground of his wife's adultery with the two co-respondents, and the wife, in her answer, denied the adultery and prayed for a judicial separation on the ground of desertion for two years without reasonable cause.

At the hearing before Butt, J., with a common jury the husband offered no evidence of his wife's adultery; and the jury found for the wife on all the issues.

BUTT, J., postponed his decision for the purpose of hearing arguments as to the effect of the deed.

Bargrave Deane, for the wife. There is no covenant in the deed not to sue, neither does the wife in any way agree to condone the desertion, which had already been completed. In *Tress* v. *Tress* (1) it was held that the Court was not bound to take notice of such a deed if it was not set up by the husband.

[He referred also to *Rose* v. *Rose*. (2)]

Middleton, for the husband. By executing the deed the wife has abandoned her right to a judicial separation. The deed is a complete accord and satisfaction for all that has gone before, and the matrimonial offence of desertion has not been committed.

[He referred to *Buckmaster* v. *Buckmaster* (3); *Parkinson* v. *Parkinson* (4); *Brown* v. *Brown and Shelton*. (5)]

(1) 12 P. D. 128.
(2) 7 P. D. 225.
(3) Law Rep. 1 P. & M. 713.
(4) Law Rep. 2 P. & M. 25.
(5) Law Rep. 3 P. & M. 202.

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BUTT, J. This is a case in which the husband sued for a divorce on the ground of his wife's adultery, the wife pleaded a denial and also alleged desertion, on which she grounded a claim for a judicial separation. The parties were living apart under a deed of separation executed in January, 1887, and the question is whether that deed ought to operate by way of bar to the decree which she claims. I had some little doubt about the matter at the trial, and therefore I adjourned my decision for further consideration. The conclusion I have come to is that I ought not to hold that the agreement bars the wife's remedy. There is authority for saying that the Court is not bound to take notice of the deed if it is not pleaded, but even if I were bound to take cognizance of the document I should hold that it was no bar to a decree for judicial separation. There is no covenant in the deed not to sue, neither is there anything approaching to such a covenant. There is no condonation of past marital offences in the deed, and no expression pointing to condonation. The cited decisions were based either on the fact that there was an agreement to live apart before the two years' desertion was completed, or that there was condonation or a covenant not to sue. Under all the circumstances of this case, I pronounce a decree for judicial separation.

Solicitors for petitioner: *Chesters.*
Solicitors for respondent: *Field, Roscoe & Co.*

W. L.

1887
July 16.

STORY *v.* STORY AND O'CONNOR.

Divorce—Adultery of Petitioner—Condonation—Discretionary Bar—Dismissal of Petition—Damages.

In a suit by the husband for divorce on the ground of his wife's adultery with the co-respondent, the jury found that the wife and the co-respondent had committed adultery, and assessed the damages at 300*l*. The wife in her answer made a counter-charge of adultery committed by her husband in the house in which he resided with his wife with a domestic servant in their employment five years before. The husband admitted the charge but pleaded and proved that his wife had condoned the offence and continued to live with him:—

Held, that under the circumstances the husband's adultery disentitled him to a decree, and his petition being accordingly dismissed, that he was not entitled to the damages.

ALFRED THOMAS STORY petitioned for a dissolution of his marriage with the respondent on the ground of her adultery with the co-respondent, and claimed damages. The respondent in her answer pleaded condonation and connivance, and charged her husband with adultery committed with a female servant in their house in 1877, which he did not deny, but pleaded that the respondent had condoned the offence and continued to live with him for five years afterwards.

The petition was tried by the President and a common jury.

The petitioner was examined, and as to his own adultery he admitted it, alleging that the servant had forced herself into his bed. He said his wife, who was absent at the time, taxed him with it, and he confessed it. They had some conversation, when she said: "I will forgive you. I am to blame. I knew it was going to take place." She made him beg the girl's pardon and kiss her. She continued to live with him for five years afterwards.

Mrs. Story, the respondent, was examined, and stated that in 1877, in consequence of the condition of the servant, she spoke to her husband. At first he said he knew nothing about it, but afterwards he confessed the adultery. The servant was discharged, and she afterwards assisted her with money and clothes.

The jury found that the respondent and co-respondent had committed adultery, and that the petitioner had not connived

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at nor condoned the adultery. They assessed the damages at £300.

Searle, for the respondent, submitted that the case was one in which the Court had discretion, and, according to the principle laid down in previous cases, would refuse to make a decree. He cited *Clarke* v. *Clarke and Clarke* (1); *Goode* v. *Goode and Hamson* (2); *Hulse* v. *Hulse and Tavernor, the Queen's Proctor intervening* (3); *MacCord* v. *MacCord, Ogle and Coxon* (4); *Morgan* v. *Morgan and Porter*. (5)

Lockwood, Q.C., for the petitioner. The Court is guided by the circumstances of each case, and in the cases cited there was something beyond the adultery which induced the Court to refuse the decree, and this case may be distinguished from them. The husband's offence was committed five years before the wife's adultery and does not in any way seem to have conduced to it.

THE PRESIDENT. I quite agree that the decision of the Court must depend in each case upon the particular circumstances of that case. I had occasion as long ago as in 1875 to go very carefully into this question, examining the principles upon which my predecessors had acted, and I endeavoured to lay down a guide for myself. I have acted in accordance with those principles ever since.

Of course, on each occasion, it is the duty of counsel for the petitioner to lay before me those circumstances which he thinks would properly lead me to a conclusion in his favour. Let us examine the story in this case, with regard to the conduct of the petitioner. His story is, that, his wife being away, the maid-servant came and thrust herself upon him. I think that this account is a highly improbable one. On the other hand, we have a perfectly natural story told by the wife. Her attention is attracted by the condition of the girl: she puts questions to her, and finds that she has been having continued intercourse with her husband. I think the wife's story more probable.

The husband had been carrying on this intercourse with the

(1) 34 L. J. (P. & M.) 94.
(2) 2 Sw. & Tr. 253.
(3) Law Rep. 2 P. & M. 357.
(4) Law Rep. 3 P. & M. 237.
(5) Law Rep. 1 P. & M. 644.

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servant girl in the house in which he resided with his wife—a form of adultery always treated as of a serious kind. Now it is perfectly true that the wife—as wives frequently do—forgave her husband. But it is impossible not to feel, that, after a man has committed himself in this way, it must have a very serious effect upon those feelings in the wife which go far to constitute the safeguards of married life. She would be more likely to fall into error, having the example of her husband before her. Reference has been made to the case of *M'Cord* v. *M'Cord* (1), and in that case I dwelt on the facts which constituted the reasons inducing me to exercise my discretion in refusing a decree. In the present case I come to the conclusion that the husband is not entitled to come into this Court and claim release from the bond of marriage, he having shewn himself regardless of the obligations of that state. I therefore dismiss the petition with costs against the co-respondent on those issues which have been found against him, and the usual order as to the wife's costs.

Lockwood, Q.C., inquired as to the damages.

THE PRESIDENT. They go with my decision on the petition. As the petition is dismissed the petitioner is not entitled to damages.

Solicitor for petitioner: *C. J. Smith.*
Solicitors for respondent: *T. Beard & Sons.*
Solicitor for co-respondent: *M'Kenna.*

(1) Law Rep. 3 P. & M. 237.

W. L.

[IN THE CONSISTORY COURT OF LONDON.]

1887
July 19.

IN THE MATTER OF HOLY TRINITY CHURCH, STROUD GREEN.

Communion Table—Side Chapel.

The Court, on the ground of convenience and saving of expense, decreed a faculty for the erection of a communion table in a side chapel of a church in which there was already a communion table.

APPLICATION for a faculty to authorize the construction of a side chapel at the east end of the south aisle of Holy Trinity Church, Stroud Green, and also to sanction the introduction of a communion table into the chapel.

Beaufort, for the petitioners. There is no reported case in favour of this application with the exception of a recent decision in the Consistory Court of Ripon, when the introduction of a communion table in a side chapel in the parish church of Leeds was sanctioned. [He referred to *Hudson* v. *Tooth* (1); 1 Cardwell's Doc. Annals, 94–101.] There are numerous instances of communion tables in side chapels in cathedrals and in some of the parish churches.

[It appeared from the evidence of Dr. Linklater, the vicar, that the church would seat about 1200 persons. The population of the parish was 10,000. There were four daily services, and extra ones on Wednesdays and Fridays. It would sometimes happen that at the early services not more than half a dozen persons were present. Some of the congregation seated themselves at the bottom of the church, and it would be a great convenience to bring them together in the chapel.

The use of the church for the early services involved the warming and lighting of the whole of it. By limiting the warming and lighting to the chapel there would be a saving of 50*l.* per annum.

The application had been approved of by the vestry.]

DR. TRISTRAM, Q.C. The application in this case is for a faculty to authorize the erection of a screen between the chancel and the

(1) 2 P. D. 125.

1887

IN RE HOLY TRINITY CHURCH, STROUD GREEN.

east end of the south aisle of the church, and across the aisle, and the fitting up of the space inclosed by the screen as a chapel to be used for early daily prayer and for the administration of early Holy Communion on week days and on Sunday mornings, when the congregration is a small one. For the latter purpose the Court is asked to sanction the introduction of a communion table into the chapel, there being, of course, one already in the chancel.

The application is based on convenience and the saving of expense. When the congregation is small, it is manifestly more convenient both for the congregation and the officiating minister that the former should be assembled within the limited space of the chapel, instead of being scattered over a large church; and according to the evidence the difference of the cost in lighting and heating the chapel in the present case, instead of the church, for such services, is about 50*l.* per annum in favour of the chapel.

On these facts the Court would have no hesitation in granting the faculty, provided it may by law do so, the legal question for its consideration is, whether it is competent to it, having regard to the wording of the rubric and the 82nd canon, ordering that there shall be one communion table in a church, to authorize the introduction of a second one within a parish church.

In the pre-Reformation period it was not unusual to have two or more altars in parish churches. These were removed under the injunctions as tending to superstition, and in their place was substituted one communion table of wood. It is clear that the rubric and the 82nd canon contemplate there being only one holy table in a church, and if this had been an application to introduce one into the aisle simply, and not into what is to be practically a chapel, I am not prepared to say that the Court would have been justified in granting it. But this question does not arise in the present case. I am aware that there are in the side chapels in many of our cathedrals holy tables, as there is here in St. Paul's, and my attention has also been directed to the fact, that several of our bishops have consecrated churches with communion tables in side chapels.

But these cases cannot be considered as having the force of legal precedents in this Court; for cathedrals not being within

the jurisdiction of the Bishop's Court, alterations are made in them and ornaments introduced into them without the sanction of any judicial decision, or a judicial order. In *Westerton* v. *Liddell* (1) it was held that the fact of an ornament having been in a church at the time of its consecration did not necessarily legalise it, or preclude its subsequent removal by faculty if the Court were satisfied of its illegality.

The attention of the Court has also been directed to the fact, that faculties have issued in other dioceses for the introduction of holy tables in side chapels in parish churches.

But these, with the exception of one which came before me sitting as Chancellor of Ripon in January last, have not been the subject of a decision after a hearing in open Court. The Ripon case was an application by the vicar and churchwardens of the parish church of Leeds for the introduction in a side chapel of a holy table for use and convenience, and having had an opportunity of then fully considering the question I decreed the faculty to issue: and I adhere to that decision.

There is a principle laid down by the Judicial Committee of Her Majesty's Privy Council in *Westerton* v. *Liddell* (2), which may safely guide the Court in this case, and that is, that an ornament, though not prescribed by the rubrics or canons, may be introduced for use in a church, if subsidiary to the performance of the service of the church as prescribed by law. On this ground a credence table was permitted to remain in a church. In the rubrics or canon there is no mention of or provision made for side chapels in parish churches. But there is no provision against them, and I think their introduction with a holy table in the chapel may, in the change of circumstances owing to the demand in recent years for early morning services and for the celebration of early holy communion, be sanctioned by this Court on the ground of convenience and a saving of expense, and to meet the requirements of the times.

The Court, therefore, decrees the faculty as prayed.

Proctor for the applicants: *Brooks.*

(1) Moore's Special Report, pp. 21, 22. (2) Moore's Rep. p. 187.

E. S. R.

1887

July 13.

IN THE GOODS OF W. W. BOLTON.

Probate—Estate in England and Belgium—Two Wills disposing separately of each—Will in Belgian Form—Grant of Probate of both to English Executor—Practice.

A testator having an English domicil of origin died in Belgium possessed of property in England and in Belgium. He left two wills, one in the English form disposing of his property in this country, the other in the Belgian form disposing of his estate situate in Belgium. The Court, on the renunciation of the Belgian executor and on an affidavit that according to the law of Belgium the Belgian will only applied to the property in that country, granted probate of both wills, as together constituting the last will of the deceased, to the English executor.

THE Rev. William Watson Bolton, deceased, died at Bruges, in the kingdom of Belgium, May 6, 1887. He had lived at Bruges for fifteen years before his death—having been previously for many years British chaplain at Frankfort-on-the-Main. From time to time during his residence at Bruges he had talked of returning to England to end his days, and had made inquiries as to suites of chambers and flats in London—but for the last two years of his life he had become feeble in health, and seemed to have settled down permanently at Bruges.

At the time of his death he was possessed of a house at Bruges and shares in a banking company there. He had also money lent at interest in Canada, and was entitled for life to the income of certain funds lent on mortgage and also to a fund in the Court of Chancery in England.

On September 9, 1885, he duly executed at Bruges a will prepared in England, by which he bequeathed all his personal estate in England and Canada to his sister, Mrs. Coare, and in the event of her dying in his lifetime to her three daughters, and he appointed Mr. Freeman, his solicitor in London, the sole executor thereof.

At the time of this will being executed he informed Mr. Freeman that he intended to make a will in Belgian form disposing of his property in Belgium.

On September 29, 1886, he executed a will at Bruges in the Belgian form which commenced as follows:

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IN THE GOODS OF BOLTON.

"Before me, M. Jules Jacques, notary, residing at Bruges, and in the presence of Jean Castelyn, Ange de Cormick, Adolphe Mansaert, and Pierre Van Twyckom, all four residing at Bruges, witnesses selected by the testator hereinafter named and all undersigned, appeared

"Mr. William Watson Bolton, gentleman, of no occupation, residing at Bruges, who after having requested me to prepare and witness the execution of his will in reference to his property situate in Belgium, has declared the same to me as follows, in the presence of the four witnesses hereinafter named."

Then followed numerous bequests of legacies to relations and servants and charitable institutions, all payable out of property situate in Belgium. By this will also he constituted his sister, Mrs. Coare, his sole heiress, after payment of the legacies, and in the event of her death before him, her three daughters; and he appointed as his testamentary executor M. Julien Verstraete, solicitor of Bruges.

The will also contained this clause:—

"I revoke all wills and other testamentary dispositions which I may have made previous to this day."

Searle, moved that probate of the two wills, as together constituting the will of the deceased, be granted to the executor of the English will, Mr. Freeman. It is essential to the validity of a Belgian will that it should be dictated to a notary in the presence of witnesses. That appears to have been done here. The recital, which states that the will has reference to his property in Belgium, was dictated to the notary, and is as much a portion of the will as the disposing portion of it. The Belgian executor consents to the grant going to Mr. Freeman, and is ready to file a renunciation.

THE PRESIDENT made the order as prayed subject to an affidavit being filed that by the law of Belgium the recital in the Belgian will that it had reference only to the testator's estate situate in Belgium formed part of the will itself—and also that the Belgian executor had renounced and consented to the grant applied for.

Solicitors: *Freeman & Bothamley.*

W. L.

1887
July 26;
Aug. 9.

THE GERTRUDE.
THE BARON ABERDARE.

Interest—Damages—Action transferred to Admiralty Division—Judicature Act, 1873, *s.* 16.

The practice of the Admiralty Division, by which interest is allowed on the damages awarded to the plaintiff from the time when the claim arose, extends to actions over which the Court had no jurisdiction before the Judicature Acts, and also to actions transferred to the Admiralty Division for the purpose of the assessment of damages by the registrar and merchants.

THE GERTRUDE.

July 26. MOTION to vary the registrar's report, viz., by directing that the plaintiffs were not entitled to interest on the amount awarded to them by the registrar and merchants.

The action, which was for damage to cargo, was one which before the Judicature Acts could not have been tried in the High Court of Admiralty, inasmuch as the owners of the vessel were domiciled in England, and it was not therefore within 24 Vict. c. 10, s. 6. The registrar and merchants had awarded the plaintiffs the sum of 9800*l.*, together with interest from the 4th of June, 1886, the date of the stranding of the vessel and the injury to the cargo to the date of payment, at the rate of 4 per cent. per annum.

Barnes, for the defendants. This action was tried by this Division as a branch of the High Court of Justice, and not in the exercise of the jurisdiction of the Court of Admiralty transferred to the High Court by the Judicature Act, 1873, s. 16. The ordinary rule as to damages applies, and interest should not be given, for in actions tried by a jury interest can only be given in the cases specified by 3 & 4 Will. 4, c. 42, s. 29. Interest is given in the Admiralty Division, but only in such cases as were originally within the jurisdiction of the Court of Admiralty. The proper measure of damages is the value of the goods at the port of destination: *Rodocanachi* v. *Milburn* (1). The damages should have been so assessed here, and therefore the report should be varied by disallowing the interest.

(1) 18 Q. B. D. 67.

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THE GERTRUDE.
THE BARON ABERDARE.

Sir W. Phillimore, for the plaintiffs. This case having been tried in the Admiralty Division of the High Court, the rules in force there are applicable to it. It would be inconvenient if in particular cases of damage to cargo the registrar departed from the rules by which he is ordinarily guided. The interest is in place of the estimated profit at the port of destination, and is added to the invoice value of the goods, and the rule in force in the Admiralty registry produces the same result in effect as the common law rule.

Barnes, in reply. In this case the invoice and market value of the goods were the same, and the defendants have therefore been compelled to pay by way of interest a larger amount of damages than if the case had been tried in the Queen's Bench Division.

Cur. adv. vult.

THE BARON ABERDARE.

Aug. 9. MOTION to confirm the registrar's report. The action, which was commenced in the Queen's Bench Division, was brought by the owners of the *Baron Aberdare* against the London and St. Katharine's Dock Company for breach of duty in the course of undocking the *Baron Aberdare*, whereby she was sunk after causing damage to several other vessels. After judgment for the plaintiffs the action was transferred to the Admiralty Division in order that the damages might be assessed by the registrar and merchants. The registrar awarded the plaintiffs 7500*l.*, with interest at the rate of 4 per cent. per annum to the date of payment.

Hollams, for the plaintiffs, moved to confirm the report of the registrar.

Barnes, for the defendants, objected to the award of interest on the grounds urged in the *Gertrude*. He also referred to the following cases: *Higgins* v. *Sargent* (1); *Calton* v. *Bragg* (2); *Smith* v. *Kirby*. (3).

Hollams, in reply, referred to *Straker* v. *Hartland* (4) and *The Northumbria*. (5)

(1) 2 B. & C. 348.
(2) 15 East, 223.
(3) 1 Q. B. D. 131.
(4) 34 L. J. (Ch.) 122.
(5) Law Rep. 3 Ad. & E. 6.

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THE GERTRUDE. THE BARON ABERDARE.

THE PRESIDENT. I was prepared to give judgment this morning in the *Gertrude*, which case I had taken time to consider, but I deferred doing so until I had heard the arguments in the *Baron Aberdare*.

There can be no doubt that it has been a long established practice of the Admiralty Court to allow interest on the amount awarded to plaintiffs from the time when the claims arose. This practice was very fully considered by my learned predecessor in the *Northumbria* (1) in regard to matters strictly within the jurisdiction of the Admiralty Court. It is unnecessary for me to travel over that ground again, since it is clearly established that in Admiralty actions there should so far as possible be a complete restitutio in integrum, and for this purpose the award of interest on the damages is necessary. It is a sound and equitable rule, and I can only regret that it is not also the common law rule.

The question is raised in the *Gertrude* whether the registrar, under the circumstances in which that case came before this Court, was bound to depart from the usual Admiralty rule, and to apply the common law rule. I am of opinion that he was not so bound. Reference was made in the course of the argument to 3 & 4 Wm. 4, c. 42. That statute is purely permissive, it does not affect to alter the law in any case, but it gives power to award interest in some cases. It applies only to cases tried before a jury, and I am left entirely free to say what rule should be applied to every case which is tried in the Admiralty Division. I therefore confirm the registrar's report in the *Gertrude*.

The *Baron Aberdare* differs a little as to the facts. It has been argued that the registrar was simply an arbitrator. I do not think he was; but assuming him to be one, it appears to me to make no difference. It was right and proper for him to award interest in whichever character he decided the case. *The Northumbria* (1) and *Smith* v. *Kirby* (2) each have a bearing on this case, because in the latter case an arbitrator found in accordance with the decision in the *Northumbria*, that he could award interest. This fact was, in my opinion, brought to the knowledge of the Court, and it held that the Admiralty rule was rightly

(1) Law Rep. 3 Ad. & E. 6. (2) 1 Q. B. D. 131.

applied, and that interest should be given. I therefore in the *Baron Aberdare* confirm the report. The unsuccessful party must in each case pay the costs of the motion.

Solicitors for plaintiffs in the *Gertrude: Stokes, Saunders, & Stokes.*

Solicitors for defendants in the *Gertrude: Botterell & Roche.*

Solicitors for plaintiffs in the *Baron Aberdare: Hollams, Son, & Coward.*

Solicitors for defendants in the *Baron Aberdare: Hacon & Turner.*

E. S. R.

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PRACTICE—*Production of Documents—Professional Privilege—Letters to Solicitor—Interrogatories—Relevancy.*] The plaintiff sued to recall probate on the ground that the testator was not of sound mind, and that the will was obtained by the undue influence of the defendants, two of whom were the executors, and the third universal legatee. After the commencement of the action four anonymous letters relating to the matters in dispute were received—two by the plaintiff, one by her solicitor, and another by her counsel in

PRACTICE—*continued.*

the action:—*Held*, by the Court of Appeal, varying the order of Butt, J., that the letters to the plaintiff must be produced, but that the letters to the solicitor and counsel were privileged, for they must be taken to have been sent to them for the purposes of the action and by reason of their being the plaintiff's legal advisers in the action, and the privilege was not lost because they were not sent in consequence of any request by the solicitor and counsel, nor obtained by their exertions.—The plaintiff in the same action delivered interrogatories for the examination of the defendants, asking what sums they had received from the testator by way of payment for services, loan or gift, and whether the universal legatee had since the death of testator made over any and what part of the property to the other defendants. The defendants declined to answer these interrogatories as irrelevant:—*Held*, affirming the order of Butt, J., that the interrogatories must be answered, the period in the first interrogatory being limited to three years. In re Thomas Holloway. Young *v.* Holloway - C. A. 167

2. —— *Intervention—Two Sets of Costs allowed.*] Where an intervener in a probate suit had been cited to appear by the defendants, the unsuccessful parties, and had been charged by them with procuring the will by undue influence, the Court, in pronouncing for the will, departed from the usual practice of allowing only one set of costs, and condemned the defendants in the costs of the intervener as well as of the executors. Tennant *v.* Cross - - - - 4

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WILL — *Execution — Mark — Foot or End — Intention—Revocation*—1 *Vict. c.* 26, *s.* 9—15 *Vict. c.* 24, *s.* 1.] A testator two days before his death, being paralysed on one side and partly speechless, intimated to the two medical men in attendance on him his desire to make a will. They interpreted his wishes by signs and wrote them down on a card. He executed the document by making his mark, which however appeared in the middle of the writing, and they then put their initials as witnesses at the back.—Subsequently, after a conversation with one of the testator's relatives, they returned to his room, and telling him that they had taken on themselves more responsibility than they ought to have taken, and that what they had written must be regarded as a memorandum, they erased their initials at the back. The testator seemed to acquiesce in this, but the card was found after his death in a handbag which he kept near his bed, and there was evidence that he had shewn it to the lady whom he intended it to benefit, telling her it was for her, and wished her to take it:—*Held*, that the card constituted a valid testamentary paper duly witnessed, expressing the intentions of the deceased, and that what passed at the erasure of the witnesses' initials did not amount to a revocation; but that it was not signed at the "foot or end" within the meaning of the statute, and was therefore not duly executed and not entitled to probate. Margary *v.* Robinson - - - 8

2. —— *Codicil executed on Margin of Will—Foot or End—Wills Act* (1 *Vict. c.* 26), *s.* 9—*Lord St. Leonards' Act* (15 *Vict. c.* 24), *s.* 1.] A testator duly executed a will prepared by a solicitor which was written on the first side of a sheet of foolscap paper. Desiring shortly before his death to make an alteration in the disposition of his property he called in the assistance of a neighbour, who wrote out a codicil on the third sheet of the foolscap, beginning, "The following alterations having been first made," and ending with an attestation clause in due form. The mark of the testator, however, and the signatures of the attesting witnesses, were written opposite the body of the will on the margin of the first page, the person who prepared the codicil being under the impression that as it was an alteration in the will it ought to be attested on the margin:—*Held*, that the codicil was not duly executed, and probate refused. In the Goods of Benjamin Hughes - - - - - 107

3. —— *Draft Wills—Codicil only duly executed Paper forthcoming—Revocation—Wills Act* (1 *Vict. c.* 26), *s.* 20.] At the death of a testatrix the sole testamentary papers forthcoming were a duly executed codicil and two drafts of wills, as to the execution or revocation of which there was no evidence:—*Held*, that though the codicil by its language was dependent on the will to which it belonged, and could not be construed without it, it ought to be admitted to probate, not having been revoked in any of the methods prescribed by the Wills Act.—*Black* v. *Jobling* (Law Rep. 1 P. & M. 685) followed. Gardiner *v.* Courthope - - - 14

4. —— *Execution—Evidence—Attesting Witness not to be found—Affidavit of attesting Witness at the time of granting Probate—Order XXXVII., r.* 1.] In a suit for revocation of probate on the grounds of undue execution, and incapacity, where it appeared that every effort had been made to find one of the attesting witnesses but without success—the Court allowed the affidavit made by him eight years before, at the time of proving the will at the district registry, to be admitted as evidence of execution and capacity. Gornall *v.* Mason - - - - 142

5. —— *Mutilation — Revocation of Appointment of Executors—Trustees— Executors according to the Tenor.*] A testator by his will appointed

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two executors, with the usual directions as to payments of debts, &c. He also appointed the same persons trustees, with directions to pay the income arising from his property to his wife and his only son in equal shares during her life or widowhood, and after her death or re-marriage the whole estate was bequeathed to the son absolutely. There were also alternative trusts in the case of the son dying in the wife's lifetime, either unmarried or married leaving children.—After his death the will was found with the clause appointing executors cut out of it, and there was evidence of declarations by the testator that he had cut it out with a pair of scissors, with the intention of cutting out the name of one of the executors.—The wife died in the lifetime of the testator, and in the events which had happened at his death the son was the only person entitled to the estate:—*Held*, that the appointment of executors was revoked by the mutilation of the will; that the trustees were not executors according to the tenor; and that the son was entitled to a grant of administration with the will annexed. In the Goods of Maley - - 134

6. —— *Revocation—Scratching out Signatures*

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— Wills Act (7 *Will.* 4 & 1 *Vict. c.* 26), *s.* 20.] A will which after execution had remained in the custody of deceased was found in her repositories after her death with her own signature and the signatures of the attesting witnesses scratched out as with a knife:—*Held*, that there was a revocation within the requirements of s. 20 of the Wills Act. In the Goods of Henrietta G. Morton 141

7. —— *Estate in England and Belgium—Two Wills disposing separately of each—Will in Belgian Form—Grant of Probate of both to English Executor—Practice.*] A testator having an English domicil of origin died in Belgium possessed of property in England and in Belgium. He left two wills, one in the English form disposing of his property in this country, the other in the Belgian form disposing of his estate situate in Belgium. The Court, on the renunciation of the Belgian executor and on an affidavit that according to the law of Belgium the Belgian will only applied to the property in that country, granted probate of both wills, as together constituting the last will of the deceased, to the English executor. In the Goods of W. W. Bolton - - 202

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CRUELTY—*General Charge—Particulars—Pleading.*] Evidence of an act of actual violence is not admissible where only a general allegation of cruelty has been made in a petition. — Where evidence was offered that the husband had struck his wife a blow, and no such specific charge had been made in the petition, the Court allowed the hearing to be adjourned in order that particulars might be furnished. Brook *v.* Brook - 19

DESERTION—*Husband's Petition—Plea of Desertion set up by Wife—Deed of Separation—No Covenant not to sue or to condone—Judicial Separation.*] In a suit by the husband for dissolution on the ground of his wife's adultery the wife in her answer made a counter-charge of desertion, and prayed for a judicial separation.—It appeared that the husband left his wife in November, 1884, and in January, 1887, a deed was executed by which the wife agreed to live apart from her husband, but there was no covenant not to sue and no agreement to condone past offences.—The jury found all the issues in favour of the wife:—*Held*, that the deed was not a bar to the wife's remedy, and that she was entitled to a decree of judicial separation. Moore *v.* Moore, Chadwick & Griffiths - - - - - - 193

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JUSTICES—*continued.*
refusal by the justices to vary such order, is subject to appeal to the Probate and Admiralty Division, although the justices have stated a case for the opinion of the Queen's Bench Division, which has not been determined.—Where an order has been made under s. 4 authorizing a wife to refuse to cohabit with her husband, the presumption of non-access applies from the date of the order as in the case of a judicial separation; and the justices on an application to vary the order on account of the wife's adultery cannot refuse to receive the direct evidence of the husband or the admissions of the wife in proof of the paternity of a child born more than nine months after the separation. Hetherington *v.* Hetherington - - 112

LEGITIMACY—*Paternity of Child born in Wedlock — Duration of Pregnancy — Presumption of Legitimacy—Evidence to rebut.*] The presumption in favour of the legitimacy of a child born in wedlock is not a presumptio juris et de jure but may be rebutted by evidence, which must be clear and conclusive and not resting merely on a balance of probabilities.—In a suit for declaration of legitimacy where a child had been born 276 days after the last opportunity of intercourse between the husband and wife, and where there was evidence in the wife's conduct tending to shew that she regarded the child as the offspring of her paramour, the President directed the jury that it was for them to say whether on the whole of the evidence given on behalf of those who asserted illegitimacy, the conviction had been brought home to their minds that the husband was not the father of the child; and read to them the opinion of Lord Lyndhurst in *Morris* v. *Davies* (5 Cl. & F. 163). The jury found that the child was illegitimate:—*Held*, by the Divisional Court, that the direction was right, and that the verdict was not against evidence. Bosvile *v.* Attorney-General. Bosvile and Others cited - 177

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NAVY—Pay of surgeon—Order for attachment
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NULLITY—*Duress—Mental Prostration—Incapacity to resist Coercion—Decree.*] The petitioner, a young woman of twenty-two years of age, entitled to a sum of 26,000*l.* in actual possession and a considerable sum in reversion, had become engaged to the respondent, and shortly after coming of age was induced by him to accept bills to the amount of 3325*l.* The persons who had discounted these bills subsequently issued writs against her, and threatened to make her a bankrupt. The distress caused by these threats seriously affected her health, and reduced her to a state of bodily and mental prostration, in which she was incapable of resisting coercion and threats, and being assured by the respondent that the only method of evading bankruptcy proceedings and exposure was to marry him, she reluctantly went through a ceremony of marriage with him at a registrar's office. In addition to other threats

NULLITY—*continued.*
of ruining her, the respondent immediately before the ceremony threatened to shoot her, if she shewed that she was not acting of her free will. The marriage was never consummated, and the petitioner and the respondent separated immediately after the ceremony:—*Held*, that there was not such a consent on the part of the petitioner as the law requires for the making of a contract of marriage, and that the ceremony before the registrar must be declared null and void. Scott *v.* Sebright - - - - - 21

PLEADING — Cruelty — General charges — Evidence of specific acts - - 19
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PRACTICE—*Attachment of Debts—Navy—Pay of Surgeon—Order for Attachment—Costs.*] The pay of a surgeon in Her Majesty's navy who is in active service cannot be assigned, and therefore cannot be attached for costs.—Decision of Butt, J., affirmed. Apthorpe *v.* Apthorpe - C. A. 192

PREGNANCY, DURATION OF — Paternity of child born in wedlock—Presumption of legitimacy—Rebutted by evidence 177
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RESTITUTION—*Deed of Separation—Covenant not to sue—Non-appearance of Respondent.*] The parties in a suit for restitution of conjugal rights had been living apart under a deed of separation by which the wife covenanted not to take any proceedings to compel her husband to cohabit with her. The husband, who had not fulfilled his covenant to pay his wife 200*l.* a year, did not appear in the suit.—The Court, notwithstanding the covenant in the deed, granted the wife a decree of restitution. Tress *v.* Tress - 128

SEPARATION DEED—Divorce—Husband's petition—No covenant not to sue or to condone - - - - - 193
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—— Restitution — Conjugal rights—Covenant not to sue—Non-appearance of respondent - - - - - 128
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SEPARATION ORDER—Application to discharge —Appeal—Evidence of wife's adultery
See Justices. [112

SETTLEMENTS, VARIATION OF—*Bastardising of Issue—Evidence.*] On a petition for variation of settlements after a decree for dissolution of marriage by reason of the wife's adultery, where a child had been born between the date of the decree nisi and decree absolute, and fourteen months after the wife had eloped from her husband, the Court refused to transfer funds in settlement to the parties free from the trusts of the settlement, and also refused to order an inquiry into the legitimacy of the child. Pryor *v.* Pryor [165

2. —— *Permanent Maintenance — Husband and Wife entitled to Property in Reversion—Dum Casta et Sola Clause—Court of Divorce Act* (20 & 21 *Vict. c.* 85), *s.* 32.] The Court in allotting permanent maintenance will not interfere with

SETTLEMENTS, VARIATION OF—*continued.*

reversionary interests except under special circumstances, where for instance it would be otherwise impossible to secure a provision for the wife.—On a petition for permanent maintenance and variation of settlements, after decree absolute at the wife's suit for adultery and cruelty, the registrar found that the respondent would come into possession on the death of a person aged ninety years of a sum which would about double his income. The wife, in addition to the income arising out of a fund in settlement in which she had the first interest, was entitled to a sum in reversion which would also about double her income. The husband had brought nothing into settlement, and the registrar proposed that he should secure to his wife a present annual payment bringing up her income to a third of the joint income, and that on his reversion falling in he should secure a further sum bringing up her future income to the same proportion, taking her reversion also into consideration. The Court refused to confirm this recommendation, but allotted the wife an annual sum equal to one-third of the husband's present income, leaving the reversionary interests of both parties untouched. The Court also declined to insert a dum sola et casta vixerit clause in the order. Harrison *v.* Harrison - - 130

3. —— *Division of Trust Fund.*] By a post-nuptial settlement a husband assigned certain property to trustees on trusts to pay him the income during his life, or until he had incurred a forfeiture, and on a determination of his interest, to his wife for her life, with further discretionary trusts for the benefit of the husband's next of kin, or for the benefit of a second wife, or the issue of a second marriage.—The husband became bankrupt, and by a compromise sanctioned by the Chancery Division a portion of the fund was assigned to his trustee in bankruptcy, and his interest in the remainder was assigned to the trustees of the settlement.—Subsequently the marriage was dissolved on account of the wife's adultery, and on a petition for variation of settlements the registrar proposed that the trusts of the settlement should be extinguished, and that seven-twelfths of the fund should be paid to the husband, and five-twelfths to the wife.—Both parties agreed to this, but the trustees of the settlement objected, and the Court refused to sanction a division of the fund, but ordered that the income of five-twelfths of it should be paid to the wife, and that in all other respects the trusts of the settlement should remain in force. Smith *v.* Smith - - - - - - 102

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20 & 21 Vict. c. 85, s. 32 - - - 130
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41 & 42 Vict. c. 19, s. 4 - - - 112
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—— How far controlled by charterparty—Exception of negligence of master and crew - - - - - 36
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CASES:—*Armstrong* v. *Lancashire and Yorkshire Ry. Co.* (Law Rep. 10 Ex. 47), overruled - - - - 58
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—— *Chieftain, The* (Br. & L. 104) overruled 158
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—— *Clyde Navigation Co.* v. *Barclay* (1 App. Cas. 790) considered - - 46
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—— *Edwin, The* (Br. & L. 281), overruled 158
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—— *Fairport, The* (8 P. D. 48), approved 158
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—— *Feronia, The* (Law Rep. 2 A. & E. 65), approved - - - - 158
See Disbursements.

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—— *Glentanner, The* (Swa. 415) approved 158
See Disbursements.

—— *Mary Ann, The* (Law Rep. 1 A. & E. 8), approved - - - - 158
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—— *Princess Helena* (Lush. 190) overruled 118
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—— *Thorogood* v. *Bryan* (8 C. B. 115) overruled
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CHARTERPARTY—Excepted perils—Charterparty controlling bill of lading - 36
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COLLISION—*Damages for Loss of Life—Improper Navigation—Both Ships to blame—Rights of Persons not responsible for Navigation of Ship—Lord Campbell's Act* (9 & 10 *Vict. c.* 93), *s.* 1—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 9.] A collision having occurred through the fault of both vessels, two persons on board of one of them, an engineer and a passenger, who had nothing to do with the navigation, were drowned:—*Held*, by the Court of Appeal (Lord Esher, M.R., Lindley and Lopes, L.JJ.), reversing the decision of Butt, J., that the deceased persons were not to be deemed to be identified with those in charge of the vessel on board of which they

COLLISION—*continued.*
were, so as to debar their personal representatives from maintaining an action of negligence against the owners of the other vessel.—*Thorogood* v. *Bryan* (8 C. B. 115) and *Armstrong* v. *Lancashire and Yorkshire Ry. Co.* (Law Rep. 10 Ex. 47) overruled.—*Held*, also, affirming the decision of Butt, J., that actions under Lord Campbell's Act are not Admiralty actions and are not affected by the Judicature Act, 1873, s. 25, and therefore that the Admiralty rule as to half damages does not apply to them. The Bernina (2) C. A. 58

2. —— *Jurisdiction—Damage to Cargo—24 Vict. c. 10, s. 7.*] Under 24 Vict. c. 10, s. 7, the Admiralty Division has no jurisdiction to entertain an action in rem by the owners of cargo against the vessel on which it was laden for damage done to such cargo. The Victoria 105

3. —— *Vessel at Anchor—Burden of Proof—Compulsory Pilotage.*] In an action for damage by collision it appeared that the defendants' vessel while in motion came into collision with the plaintiffs' vessel, which was at anchor:—*Held*, that the fact that the plaintiffs' vessel at the time of the collision was at anchor and could be seen was primâ facie evidence of negligence on the part of the defendants, and that the burden of proof was then upon them to rebut the presumption of liability, by shewing either that the collision was occasioned by no fault on their part, or that it was due to inevitable accident, or that it was solely the fault of a pilot who was on board their vessel by compulsion of law.—*Clyde Navigation Co.* v. *Barclay* (1 App. Cas. 790) considered. The Indus - - C. A. 46

3. —— *Pilotage—International Rules for the Navigation of the Danube, Arts.* 85, 89, 92.] By arts. 85, 89, and 92 of the International Rules for the Navigation of the Danube, pilotage is compulsory in the case of a vessel navigating the Danube, but the master of such a vessel is not required to give up the navigation of it to the pilot. Where, therefore, the master of such a vessel has in fact given up the navigation of it to a pilot the owners remain answerable for damage caused by the improper navigation of the pilot. The Agnes Otto - - - - 56

4. —— *Sailing Rules—Regulations for Preventing Collisions at Sea, art.* 3—*Mersey Rules, rule* 5.] At the trial of an action for damage by collision, it appeared that the starboard light of the plaintiffs' vessel was obscured by the cathead to an extent of from 2½ to 3 degrees; but that with this exception her side lights showed an unbroken light over 10 points of the horizon:—*Held*, that there was no such infringement of art. 3 of the Regulations for Preventing Collisions at Sea as to oblige the Court, under the Merchant Shipping Act, 1873, s. 17, to hold the vessel to blame for the collision.—It also appeared that the stern light of the plaintiffs' vessel was placed on deck abaft a house on the after part of the deck:—*Held*, that this was an infringement of rule 5 of the Mersey Rules, but the Court, having regard to the position of the plaintiffs' and defendants' vessels, *held*, that the infringement could not have contributed to the collision. The Fire Queen [147

COLLISION—*continued.*
—— Transhipment—Loss of goods by perils not previously excepted—Liability of shipowner - - - - 36
See Ship.

COMPULSORY PILOTAGE—Exemption—London district - - - - 154
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CO-OWNERSHIP — *Action of Restraint—Ship's Husband.*] The plaintiff and all the other owners of a vessel appointed two persons as ship's husbands and managers by an agreement, which stated that they should be and at all times thereafter discharge the duties of ship's husbands and managers of the said vessel and of agents for the owners, their executors and administrators. The agreement also gave the managers authority to perform all the usual duties of ship's husbands:—*Held*, that this agreement did not debar the plaintiff as owner of two sixty-fourth shares in the ship from obtaining in an action of restraint bail from the other part owners in the value of his shares. The England - - - 32

2. —— *Restraint—Bail for Safe Return—Release of Sureties—24 Vict. c.* 10, *s.* 8.] In an action of restraint two sureties executed a bail bond for the safe return of the ship. No time was fixed in the bond at which the liability of the sureties should cease. After the bond had been in existence for nearly three years, and when the vessel was in this country, and the owners of the majority of shares were changed, the sureties applied to be released from the bond:—*Held*, that the application was reasonable, and the bond was ordered to be cancelled. The Vivienne - 185

COMPROMISE—Salvage—Mistake of fact - 5
See Salvage.

CONSERVATORS—Wreck raised by conservators of Thames—Claim for life salvage 50
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DANUBE—International rules—Pilotage — Collision - - - - 56
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DISBURSEMENTS—*Maritime Lien—Liability of Master — Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 10—*Admiralty Court Act*, 1840 (3 *& 4 Vict. c.* 65), *s.* 6—*Merchant Shipping Act*, 1854 (17 *& 18 Vict. c.* 104), *s.* 191.] Under the Admiralty Court Act, 1861, s. 10, and the Merchant Shipping Act, 1854, s. 191, the master has a maritime lien on the ship for disbursements. *The Mary Ann* (Law Rep. 1 A. & E. 8) and *The Glentanner* (Swa. 415) approved.—A master who has incurred liabilities in respect of necessaries for the ship can maintain an action in rem for "disbursements," though he has made no payment in respect of such liabilities at the time the action is brought. *The Feronia* (Law Rep. 2

DISBURSEMENTS—*continued.*

A. & E. 65) and *The Fairport* (8 P. D. 48) approved; *The Chieftain* (Br. & L. 104) and *The Edwin* (Br. & L. 281) overruled. The Sara [C. A. 158

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—— Sea perils—Salvage — Value of property saved—Principles on which salvage is awarded - - - - 52
See Salvage. 3.

PILOTAGE — *River Thames—Order in Council, May* 17, 1882.] A pilot who brings a ship from Gravesend to the entrance of the Tilbury Docks, and thence into the Docks, is not entitled under the Order in Council of May 17, 1882, to the special charge "for removing a vessel from moorings into a dry or wet dock" or to charge any sum other than the rate from Gravesend to Northfleet. The Clan Grant - - - 139

2. —— *Compulsory — Exemption — London District—Merchant Shipping Act,* 1854 (17 *& 18 Vict. c.* 104), *s.* 379.] By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 379, sub-s. 3, the following ships when not carrying passengers shall be exempted from compulsory pilotage in the London district—that is to say, ships trading to Boulogne, or to any place in Europe north of Boulogne.—A vessel while on a voyage from Liverpool to Hamburg was obliged by an accident to put into the Thames for repairs;—*Held,* that she was exempted by s. 379 from taking a pilot in the London district. The Sutherland [154

—— Compulsory—River Tyne—Foreign vessel [43
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PRACTICE—*Discontinuance—Rules of Supreme Court,* 1883, *Order XXVI., r.* 1 — *Compulsory Pilotage—Costs.*] In an action of damage by collision, the defendants pleaded, inter alia, that their vessel at the time of collision was compulsorily in charge of a licensed pilot, and that the negligence, if any, which caused the collision was solely that of the pilot:—*Held,* that on the plaintiff's discontinuing their action, they must pay the defendants' costs. The J. H. Henkes 106

2. —— *Interest — Damages — Action transferred to Admiralty Division—Judicature Act,* 1873, *s.* 16.] The practice of the Admiralty Division, by which interest is allowed on the damages awarded to the plaintiff from the time when the claim arose, extends to actions over which the Court had no jurisdiction before the Judicature Acts, and also to actions transferred to the Admiralty Division for the purpose of the assessment of damages by the registrar and merchants. The Gertrude. The Baron Aberdare - 204

RESTRAINT—Co-ownership — Bail for safe return—Release of sureties - - 185
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SAILING RULES—Mersey—Collision - 147
See Collision. 4.

SALVAGE — *Compromise — Mistake of Fact — Salvage Services—Pilot.*] A compromise of a salvage action agreed to by the salvors under a mistake of fact is not binding upon them.—Two tugs rendered salvage services to a ship driven from her moorings in the Bristol Channel, by towing her, in a very heavy gale, into the River Usk. The services lasted for about three hours.

SALVAGE—*continued.*

The value of the salved ship was 4000*l.*, of her cargo 900*l.*, and of her freight 288*l.* 450*l.* was awarded.—A pilot on the salved ship who rendered trifling assistance by helping at the wheel and windlass, *held*, not entitled to salvage. The Monarch - - - - - - 5

2. —— *Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 459—*Wreck raised by Thames Conservators—Damages recovered from wrongdoing Ship.*] The defendants' vessel having been sunk in the River Thames by a collision occasioned by the fault of another vessel, the Conservators, acting under 20 & 21 Vict. c. cxlvii., s. 86, caused it to be raised and sold, and the proceeds of the sale being insufficient to defray the expenses of raising it, they recovered, under s. 86, the amount of the deficiency from the defendants. The defendants on their part recovered the full value of their vessel from the owners of the vessel which was to blame for the collision.—In an action for salvage in respect of the preservation of the lives of the crew of the defendants' vessel at the time of the collision:—*Held*, that the salvors could not recover; that the defendants' vessel not having been saved there was nothing to which the claim for life salvage could attach; and that it could not be preferred against the defendants in respect of the amount recovered as damages from the vessel to blame for the collision. The Annie - - - 50

3. —— *Principles on which Salvage is awarded — Value of Property saved — Perils of Salving Ship—Possibility of Assistance—Character of Service rendered.*] In estimating the amount of a salvage remuneration the Court takes into consideration, first, the value of the property saved, and next the actual perils from which it has been saved. In considering the perils, the possibility of assistance being rendered to the vessel in peril must be taken to lessen the amount to be awarded. The value of the salving ship will not substantially affect the amount of the reward, but the length of time to which she is exposed to additional risks is a material element for consideration. The Werra - - 52

4. —— *Salved and salving Vessels belonging to same Owners—Bill of Lading—Exceptions qualifying implied Warranty of Seaworthiness.*] A steamship became disabled at sea owing to the breaking of her fly-wheel shaft, through a flaw in the welding existing at the commencement of the voyage, but not discoverable by the exercise of any reasonable care.—The cargo on board her was shipped under three bills of lading, the first of which contained, amongst other excepted perils, the clause:—"warranted seaworthy only so far as ordinary care can provide"; the second: "warranted seaworthy only as far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers, and crew can ensure it;" and the third: "owners not to be liable for loss, detention, or damage . . . if arising directly or indirectly . . . from latent defects in boilers, machinery, or any part of the vessel in which steam is used, even existing at time of shipment, provided all reasonable means have been taken to secure efficiency."—A vessel belonging to the same owners towed the disabled vessel to a place of safety.—In an action of salvage brought by the owners, master and crew of the salving vessel against the owners of cargo in the salved vessel:—*Held*, that the owners of the salving vessel (though at the same time owners of the salved vessel) were entitled to salvage, and that the owners of the cargo had no remedy for breach of the contract of carriage, for the exceptions in the bills of lading were such as to constitute a limited warranty of seaworthiness at the commencement of the voyage, which limited warranty had been complied with by the shipowners. The Cargo ex Laertes - - 187

SEAMAN — *Agreement for Service — Breach by Shipowner—Damages.*] In an action by a seaman for breach of the stipulations in his agreement for service, the Court, in addition to the compensation provided by the Merchant Shipping Act, 1854, can award general damages for breach of the agreement, and for hardships incurred by the seaman through the vessel being employed for purposes other than those contemplated by the agreement. The Justitia - - 145

SHIP—*Charterparty—Bill of Lading—Collision—Transhipment—Loss by Perils not previously excepted—Limitation Action—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 506—*Merchant Shipping Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 54.] A cargo was shipped by the plaintiff on the defendants' vessel under a charterparty and bill of lading, not excepting the negligence of the master and crew. During the voyage, and through the negligence of the masters and crews of both ships, the vessel came into collision with another, and was so much damaged as to render it necessary to discharge her cargo at a port of refuge, and, after temporary repairs, to complete the voyage in ballast. The master transhipped the cargo with the knowledge, but without the assent or dissent of the plaintiff, into three other vessels, under bills of lading excepting the negligence of the masters and crews. Two of these vessels with their cargoes were, through the negligence of their masters and crews, lost before reaching the port of discharge. The defendants obtained a decree limiting their liability arising out of the collision to 8*l.* per ton, and the proceeds were distributed to the claimants, of whom the plaintiff was not one. In an action for non-delivery of the portion of the cargo lost:—*Held*, that the defendants were liable; for the loss did not arise from an excepted peril, and the transhipment, though justifiable, was for the purpose of earning the freight under the charterparty:—*Held*, also, that the judgment in the limitation action was no bar to the present claim, as the loss of the portion of the cargo, the subject of this action, was not caused by the collision in respect of which the defendants had limited their liability. The Bernina - - - - - - 36

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TOWAGE—*County Court Jurisdiction*—32 & 33 *Vict. c.* 51, *s.* 2, *sub-s.* 1—*Duty of Tug.*] A county court has under 32 & 33 Vict. c. 51, s. 2, sub-s. 1, jurisdiction to entertain a claim for damage for breach of a contract of towage.—It is the duty of those on board the vessel in tow to give general directions to the master of the tug as to the towage. But the master of the tug should exercise his discretion as to the proper manœuvres to be employed, especially where he is more competent to form an opinion on this point than the master of the vessel in tow. The Isca - - 34

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TYNE PILOTAGE ORDER CONFIRMATION ACT, 1865 (28 & 29 *Vict. c.* 44), *Sched., s.* 16—*Merchant Shipping Act*, 1862 (25 & 26 *Vict. c.* 63), *s.* 39—41 *Geo.* 3, *c. lxxxvi.*] Under the Tyne Pilotage Order Confirmation Act, 1865, Sched., s. 16, pilotage is not compulsory on foreign vessels entering the Tyne.—So *held* by the Court of Appeal, affirming the judgment of the President and Butt, J. The Johann Sverdrup - C. A. 43

WAGES—*Charterer and Sub-Charterer—Towage—Light and Dock Dues—Priority of Claims.*] Seamen have a maritime lien on freight due from sub-charterers to the charterers of a ship, and can arrest the cargo for the purpose of enforcing such lien.—The lien of seamen for wages ranks before a claim in respect of payments for the towage of the ship from sea to an inland port, and the light dues and dock dues. The Andalina - 1

2. —— *Master*—17 & 18 *Vict. c.* 104, *ss.* 187, 191—*Right to Ten Days' Double Pay—Merchant Seamen (Payment of Wages) Act*, 1880 (43 & 44 *Vict. c.* 16), *s.* 4—*Right to Wages to Final Settlement of Claim.*] A master is not entitled under ss. 187 and 191 of the Merchant Shipping Act, 1854, to the double pay for delay in the payment of wages recoverable by "seamen" under the former section.—*The Princess Helena* (Lush. 190) overruled.—A master is not entitled under the Merchant Seamen (Payment of Wages Act), 1880, s. 4, to wages up to the final settlement of his claim. The Arina - - - - 118

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